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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE WESTERN UNION TELEGRAPH COMPANY
Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, The Western Union Telegraph Company (the "Telegraph Company") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on October 20, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra)* is reported at 544 F.2d 87. The Federal Communications Commission's Memorandum Opinion and Order (App. D, *infra)* is reported at 55 F.C.C. 2d 668.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 20, 1976. Timely petitions for rehearing and suggestions for rehearing *en banc,* filed by the Telegraph Company and the Commission, were denied on April 22, 1977, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2350(a).

QUESTION PRESENTED

Whether the Commission's power under §214 of the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.,* to consider applications for authority to provide new forms of communications services—such as the Mailgram service jointly provided by the United States Postal Service and the Telegraph Company—is limited by Section 222(c)(2) of the Communications Act.

STATUTES INVOLVED

Sections 1, 2(a), 214, 222(a), 222(b) and 222(c), of the Communications Act, as amended, 47 U.S.C. §§151, 152(a), 214, 222(a), 222(b) and 222(c) as set forth in Appendix F, *infra.*

STATEMENT OF THE CASE

Pursuant to Section 214 of the Communications Act, the Telegraph Company filed an application with the Commission for authority to provide its new Mailgram[1] service

[1]Mailgram is essentially "electronic mail." The message is initiated by a customer by various means, including telephone, telex or TWX, over-the-counter and messenger. The Mailgram is then transmitted over Telegraph Company circuits to a computer switching center. There, the computer routes the Mailgram electroncially to the appropriate Post Office, where a postal employee takes the message from the teleprinter and puts it in the regular mails for delivery. *The Western Union Telegraph Company,* 55 F.C.C. 2d 668, 674 (1975) (App. D, *infra,* pp. 12-13).

to Hawaii. This case arises out of a decision by the majority of the Second Circuit panel below reversing the Commission's unanimous determination that it had the authority to consider the Telegraph Company's application. The jurisdiction of the court below was based on 47 U.S.C. §402(a), and 28 U.S.C. §§2342, 2343.

The Hawaiian Mailgram application confronted the Commission with an important and far-reaching question concerning competition in the international telegraph industry. Hawaii is an international point for the purposes of Section 222,[2] and, pursuant to Section 222(c)(2), the Telegraph Company had been required to divest itself of its international telegraph operations as a result of its 1943 merger with Postal Telegraph Inc.[3] At the urging of two international telegraph carriers, the Commission considered whether that section constitutes a permanent bar to the Telegraph Company's re-entry into the international market.

The Commission concluded that Section 222(c)(2) should be interpreted in a manner consistent with the other sections of the Communications Act which do not impose strict limitations on the Commission's authority but instead afford the Commission the flexibility required to achieve the Act's purposes despite changing circumstances. 55 F.C.C. 2d at 672 (App. D, *infra,* p. 10). The

[2]By a 1960 amendment to 47 U.S.C. §222(a)(10), Congress defined the continental United States as "the District of Columbia and the States of the Union, except Hawaii." 74 Stat. 411. Telegraph traffic with Hawaii was thus classified as international.

[3]Section 222(c)(2) provides in pertinent part as follows:

"Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger. . . ."

Commission determined that Section 222 did not reflect a Congressional intent to shield suppliers of international record services from competition and that the public interest would be served if the Telegraph Company were included among the potential suppliers of the new service to Hawaii.[4] 55 F.C.C. 2d at 672 (App. D, *infra,* p. 9). Relying upon the "theretofore carried on" language of Section 222(c)(2) and the legislative history, the Commission determined that that provision related only to international telegraph operations carried on as of 1943, the year Section 222 was enacted and the telegraph Company's merger with Postal Telegraph was consummated. Accordingly, the Commission held (1) that Section 222(c)(2) was not a bar to the Telegraph Company's furnishing new international telegraph services and therefore (2) that it had the authority and the responsibility to consider whether the Telegraph Company's application under Section 214[5] would, if granted, serve the public convenience and necessity.

The Second Circuit vacated and set aside the Commission's decision. Notwithstanding the "theretofore carried

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[4] In addition to the Telegraph Company, RCA Global Communications, Inc., Western Union International Inc., ITT World Communications, The Hawaiian Telephone Co. (in connection with the Telegraph Company) and The Domestic Satellite Corporation filed applications with the Commission for authority to provide a service similar to Mailgram to Hawaii. In its order the Commission merely decided that the Telegraph Company could pursue its application, and did not pass on the merits. 55 F.C.C. 2d at 673 (App. D, *infra,* pp. 10-11).

[5] Section 214 contains, *inter alia,* a broad grant of authority to the FCC to authorize the facilities needed to provide new services such as Mailgram where "the present or future public convenience or necessity require. . . ."

on" language of Section 222(c)(2), the majority concluded that that section applies to every form of record communications that has been devised since 1943 and to every form of such communications that may ever be developed in the future. 544 F.2d at 92-93 (App. A, *infra,* pp. 13-14). It also read the "divestment" requirement of Section 222(c)(2) as a continuing bar to the Telegraph Company's participation in international record communications. 544 F.2d at 93 (App. A, *infra,* p. 14). The court explicitly rejected the Commission's determination that Section 222(c)(2) should be read

> ". . . to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC 'broad and flexible powers to achieve those goals in the light of changing circumstances' "

544 F.2d at 91 (App. A, *infra,* p. 9).

Judge Mansfield dissented from the majority's decision because

> "both the plain language of §222 . . . and the circumstances surrounding its enactment make it clear that in authorizing [the Telegraph Company] and Postal Telegraph, Inc. . . . to merge, Congress did not bar the merged enterprise from ever again entering into any international operations. If Congress had wished to enact such a prohibition, it could easily have done so."

544 F.2d at 93 (App. A, *infra,* p. 15).

After explaining that the relevant legislative history "tends to point in the opposite direction" of the majority's holding, 544 F.2d at 94 (App. A, *infra,* p. 17), Judge

Mansfield concluded that the Commission's interpretation of the statute

> "is in keeping with the pattern and scheme of the Act, which is to set forth legislative objectives and give broad authority to the FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in the light of changing technology and market developments. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-73, 88 S.Ct 1994, 20 L.Ed.2d 1001 (1968)".

544 F.2d. at 96 (App. A, *infra*, pp. 20-21).

REASONS FOR GRANTING THE WRIT

By interpreting the Communications Act in a manner in conflict with the view adopted by this Court, the decision below severely limits the Commission's ability to fulfill its statutory mandate and threatens to impose a structure upon the telegraph industry which is at odds with the Commission's determination of the public interest.

The question presented has produced the sharpest of divisions between the Second Circuit majority on the one hand and Judge Mansfield and a unanimous Federal Communications Commission on the other. If allowed to stand, the decision of the Second Circuit panel will deprive the Commission of the power to consider whether the Telegraph Company may provide Mailgram or any other telegraph (or "record") service internationally, even if the Telegraph Company were the best or the only entity capable of providing such services. This decision marks a break from, and will require reexamination of, a line of Commission opinions aimed at fostering competition in both domestic and international communications services.

The present case thus involves a question of importance to the administration of the Communications Act and to the future development of the telegraph communications industry.

A. *The decision below conflicts with the view of the Communications Act adopted by this Court.*

The majority's decision is contrary to the underlying rationale of the Communications Act and is inconsistent with this Court's view of the plan of the Act as described in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).[6]

In *Southwestern Cable Co., supra*, the Court recognized that in Section 2(a) of the Communications Act, 47 U.S.C. §152(a), Congress granted the Commission "unified jurisdiction" and "broad authority" over all interstate and foreign communication by wire or radio. 392 U.S. at 172. The rationale for this expansive delegation was that the complex and dynamic nature of the communications industry renders it impossible for Congress to provide for every future communications problem and development. 392 U.S. at 172-173. This Court has recognized that effective administration of the Communications Act requires that the Commission be afforded the flexibility necessary to regulate continually evolving uses of wire and radio transmission such as Mailgram.

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[6] *Southwestern Cable Co.* and *Midwest Video Corp.* involved the Commission's authority over matters affecting its regulation of broadcasting. This Court has noted that the Commission's authority over the telegraph industry is even broader than its authority over broadcasting. *United States* v. *Radio Corp. of America*, 358 U.S. 334, 348-50 (1959).

The majority below did not attempt to reconcile Section 222(c)(2) with the underlying scheme and purposes of the Communications Act, but instead concluded that:

> "Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power."

544 F.2d at 91 (App. A, *infra*, p. 9).

By failing to give effect to the "therefore carried on" language of the statute and by reading the "divestment" requirement as a continuing bar, the court below needlessly imposes a significant restriction on the broad power granted the Commission under Section 214 to consider whether applications for facilities to provide new communications services will serve the public interest.[7] This approach squarely conflicts with the admonition in *Southwestern Cable* that courts should not

" 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' "

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[7] As Judge Mansfield points out in his dissent, the majority's failure to give effect to the plain meaning of the "theretofore" provision of Section 222(c)(2) conflicts with this Court's statement that:

> " 'It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.' *United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575, 72 S.Ct. 985, 993, 96 L.Ed. 1142 (1952). '[W]e are not free to adopt a construction which not only strains, but flatly contradicts the words of the statute.' *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 427, 92 S.Ct. 596, 601, 30 L.Ed.2d 575 (1972)."

544 F.2d at 93 (App. A, *infra*, p. 15).

392 U.S. at 177, quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968).

The conclusion of the majority below disregards the fact that Congress granted broad authority to the Commission over the communications industry to avoid the need for repeated Congressional revision and review of Commission authority. *Washington Utilities & Transp. Com'n* v. *F.C.C.*, 513 F. 2d 1142, 1157 (9th Cir. 1975); *National Ass'n of Theatre Owners* v. *F.C.C.*, 420 F. 2d 194, 199 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *General Tel. Co. of California* v. *F.C.C.*, 413 F. 2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). Indeed, if the majority's suggested remedy of Congressional revision should prevail, an "intolerable regulatory burden" would be placed on Congress the very burden "which [Congress] sought to escape by delegating administrative functions to the Commission." *General Tel. Co. of California* v. *F.C.C.*, *supra* at 398.

As stated by now Chief Justice Burger in the *General Telephone* case:

> "To give the [Communications] Act [an] overly restrictive interpretation . . . would be to prevent the Commission from employing the regulatory devices which have been established for effective common carrier control—a particularly sterile result when the carrier activity is augmenting the operations of parties which are the particular concern of the Commission's regulatory responsibility . . . . We have previously noted that the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme."

General Tel. Co. of California v. *F.C.C.*, *supra* at 402 (citations omitted).

B. The decision below severely limits the Commission's ability to fulfill its statutory mandate and threatens to impose a structure upon the telegraph industry which is at odds with the Commission's determination of the public interest.

If allowed to stand, the majority's decision will frustrate the Commission's efforts to fulfill the statutory mandate, relied on by this Court in *Southwestern Cable Co., supra* at 167, to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . . ." Communications Act, Section 1, 47 U.S.C. §151. The Commission's inability to consider the Telegraph Company's application to provide Mailgram service to Hawaii is itself a significant problem but it is not the only problem.

The Commission's decision here at issue is merely one element in a series of Commission actions aimed at fostering increased competition involving domestic and international carriers[8] with respect to the supply of new telegraphic services. The Commission's position has been that Section 222(c)(2) does not limit competition between the Telegraph Company and the international record carriers (the "IRCs") except with respect to tele-

[8] An international telegraph carrier is defined by Section 222(a)(3) of the Communications Act as

> "any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier."

These carriers are also referred to as international record carriers or "IRCs". Today, the three largest IRCs are Western Union International ("WUI"), ITT World Communications ("ITT") and RCA Global Communications, Inc. ("RCA"). WUI is a corporation formed in 1963 to acquire the Telegraph Company's international cable system and is in no way affiliated with the Telegraph Company.

graph services "theretofore carried on"—*i.e.* services provided by the Telegraph Company and Postal Telegraph at the time of the 1943 merger. This construction of the statute has not been confined solely to the Mailgram order under review. By so construing Section 222, the Commission has justified the entry of the three largest IRCs into the marketplace for domestic record communications services.[9] If the decision below stands, the Commission would seem obliged, at least as a matter of logic and fairness, to revisit the policy underlying these grants of authority. And even if it be argued that the principle of *res judicata* insulates the existing certifications from review, it is apparent that a reexamination will be required as soon as the affected carriers apply under Section 214 for additional authorizations.[10] At that juncture the Commission may be required to deny the new applications even if the provision of additional services would be in the public interest. Thus the impact of the decision below will not necessarily be limited to the Telegraph Company, but will tend to reduce competition generally and deny communications services to both domestic and international users.

The Second Circuit majority suggests that its decision may be reconciled with the entry of IRCs into the domestic market because its decision is consistent with the Commission's view that Section 222 was not intended to

[9] The IRCs and their affiliates were authorized to engage in domestic services, on the ground that the record services they provide are not the type of record services "theretofore carried on" by the Telegraph Company in 1943. *RCA Global Communications, Inc.*, 42 F.C.C. 2d 774, 780 (1973); *American Satellite Corp.*, 43 F.C.C. 2d 348, 353-54 (1973) (WUI subsequently withdrew from the American Satellite venture); *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859, 862 (1974).

[10] New facilities are added on a regular basis by all carriers, to meet increasing demands for service and to extend service to new routes. Section 214 applies in both instances.

protect the Telegraph Company from domestic competition. 544 F.2d at 91 n.l (App. A, *infra,* p. 10 n.1). This ignores that the majority presumes the existence of a Telegraph Company domestic service monopoly: permanent withdrawal from the international market is described as the "price paid by the [Telegraph Company] for the acquisition of a domestic monopoly over telegraph service." 544 F.2d at 93 (App. A, *infra,* p. 14). One necessary counterpart of such a monopoly is total exclusion of the IRCs from the domestic market. Indeed, in its petition for rehearing below, the Commission recognized that a "total separation of the domestic and international markets" is "implicit in the majority holding" (p. 10).

The decision below strips the Commission of important powers granted by Congress and rigidly structures the telegraph industry in a manner not only at odds with the Commission's view of the public interest in this case, but in conflict with an entire line of decisions aimed at broadening competition among suppliers of record communications services. The decision seriously and unnecessarily impairs the Commission's ability to protect the public interest with respect to the development of competition in both the international and domestic communications markets. Review by this Court is thus plainly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 6—September Term, 1976.

(Argued September 13, 1976 Decided October 20, 1976.)

Docket No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

v.

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Intervenors.

Before:

ANDERSON, MANSFIELD AND MULLIGAN,
Circuit Judges.

Petition by Western Union International, Inc. for review of opinion and order of the Federal Communications Commission, which decided that Title 47 U.S.C. §222(c)(2) does not bar the Western Union Telegraph Company's application for leave to establish and operate its mailgram service to Hawaii.

Petition granted and order vacated and set aside.

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ANDERSON, *Circuit Judge:*

This is a petition for review of a memorandum opinion and order of The Federal Communications Commission (FCC) in the matter of *The Western Union Telegraph Co.*, 55 F.C.C.2d 668 (1975). The FCC decided that Western Union Telegraph Co. (WU) might apply for authority, pursuant to 47 U.S.C. §214 (1970), to lease and operate facilities between the 48 contiguous United States and the District of Columbia, and the State of Hawaii for the purpose of extending WU's mailgram service to Hawaii. For the reaons set out below, the FCC's order is set aside.

A mailgram, in the words of the FCC opinion, is essentially "electronic mail." The message is picked up from a customer by various means, including telephone, telex, over-the-counter and messenger. The mailgram is then transmitted over WU circuits to its computer switching center in Middletown, Virginia. There the computer

routes the mailgram over circuits specifically dedicated to this particular service, to a preselected Post Office, where a postal employee takes the message from the teleprinter and puts it in the regular mails.

Mailgram service within the continental United States began on January 1, 1970 for an experimental, two-year period, *United Telegraph Workers, AFL-CIO* v. *FCC,* 436 F.2d 920, 921 (D.C. Cir. 1970). At the time of the FCC order in this case, there were pending before it applications for authority to provide a service similar to mailgrams filed by RCA, ITT, WUI (totally separate company from WU), the Hawaiian Telephone Co. in connection with WU and The Domestic Satellite Corp.

The contemporary American telegraph industry is made up of domestic and international "record carriers." WU is the sole domestic carrier of telegrams, while international record carriers (IRCS), which include Petitioner WUI and intervenor ITT World Communications, Inc. (ITT), traffic only in messages between the continental United States and abroad. For the purposes of accepting and delivering international telegraph messages, IRCS may maintain public offices, pursuant to 47 U.S.C. §222(a)(5), in certain FCC-designated cities of the United States known as "gateway" cities. Messages for delivery abroad which originate within the United States in other than gateway cities will generally be placed with a local WU office in the "hinterland." From there, the message will travel by WU lines to an office of an IRC and thereafter to its final destination abroad. WU distributes messages placed with it for foreign delivery with competing international carriers by use of a formula derived pursuant to 47 U.S.C. §222(e)(1).

This peculiar industry structure came about primarily through the enactment, in 1943, of 47 U.S.C. §222, which

deals with the permissive consolidations and mergers of telegraph carriers. WU came within the provisions of this statute as a result of its 1943 merger with the failing Postal Telegraph Co., *Western Union Divestment,* 30 F.C.C. 323, 325 (1961). Section 222(b)(1) allows the merger or consolidation of any two or more domestic telegraph carriers, but §222(c)(2) goes on to provide in pertinent part:

> "(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the *international telegraph operations theretofore carried on* by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission. . . ." (Emphasis added.)

International telegraph operations are defined by the statute as "record communications by wire or radio" originating or terminating at points outside the "continental United States." 47 U.S.C. §222(a)(6). By a 1960 amendment to 47 U.S.C. §222(a)(10), Congress defined the continental United States as the States of the Union and the District of Columbia, but, for this purpose, excluded Hawaii. *See* 2 U.S. Code Cong. & Adm. News, 2963, 2979-80 (1960). Telegraph traffic with Hawaii was thus classified as an international operation open only to IRCS.

Given this background, the Common Carrier Bureau, in an April 19, 1972 decision by its Chief, initially disallowed WU's application to provide mailgram service to Hawaii. The Bureau's decision was grounded on its interpretation of the legislative history of §222, which led it to conclude that Congress' intent in enacting "the divestment requirement set out in Section 222(a)(2) [sic] . . . [was] to preclude WUTC from engaging in future 'international

telegraph operations' as that term is defined in Section 222." The Bureau thus rejected an argument, posited by WU, and renewed by it before this court, that when Congress provided in §222(c)(2) that a merged domestic telegraph carrier was to divest itself of international telegraph operations "theretofore carried on," it was intended only that WU divest itself of international services and operations in existence *as of 1943,* the effective date of the statute and of the WU-Postal Telegraph merger. It further argued that, because mailgrams were not in existence in 1943 and could, therefore, be called a "new" service, different from the traditional telegraph operations carried on in 1943, §222(c)(2) did not apply to the present case. In addition to the legislative history, the Bureau relied on the FCC's decision in *Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960), discussed *infra.*

The FCC's reversal of the Common Carrier Bureau's decision entailed a finding that Congress' concern in 1943 was simply "to remedy the problems which were [then] facing the troubled telegraph industry. . .," *The Western Union Telegraph Co., supra,* 55 F.C.C.2d at 672, so that it could find

> ". . . nothing in the statute or its legislative history which mandates a broad interpretation of the divestment clause such as to disqualify WU from providing the proposed Mailgram service to Hawaii." *Id.* at 671.

The FCC first argued for a reading of the divestiture section, §222(c)(2), consistent with other sections of the Communications Act, setting down only "broad legislative goals" and allowing the FCC broad and flexible powers to achieve those goals "in the light of changing circumstances." Secondly, the FCC found in an appendix to its

opinion that the "theretofore" language of the divestiture requirement "should be interpreted to apply only to the types of operations engaged in by WU at the time of the merger in 1943." *Id.* at 677. Accordingly, the FCC held that it had the authority to allow WU to re-enter international operations for the first time since divestment of the company's international facilities in 1963, because mailgrams were a new service distinct from those offered in 1943.

The FCC is correct in presenting for decision here, only the "narrow legal question" of whether §222(c)(2) constitutes a ban on the potential re-entry of WU into international operations through the company's applications for mailgram service to Hawaii. A review of the FCC's legal conclusions and the rationale leading up to them, *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953), disclose that the Commission erred in deciding the issue as it did.

In determining the meaning of §222, it is necessary to give careful consideration to its legislative history. *Train* v. *Colorado Public Interest Group,* 96 S. Ct. Rep. 1938, 1942 (1976); *Lynch* v. *Overholser,* 369 U.S. 705, 710 (1962); *Federal Maritime Commission* v. *DeSmedt,* 366 F.2d 464, 469 (2 Cir. 1966), *cert. denied,* 385 U.S. 974 (1966). The origins of §222 lie primarily in the economic difficulties facing the American telegraph industry during the depression of the 1930's. Most affected of the large domestic telegraph carriers was Postal Telegraph Co., which borrowed heavily from The Reconstruction Finance Corporation, but, in spite of this aid, continued on the verge of financial collapse. Under these circumstances Congress, in 1939, launched a study of the telegraph industry with the passage of Senate Resolution 95. That study, reported as S. Rep. No. 769, (*Study of the Tele-*

graph Industry), 77th Cong., 1st Sess. (1941), resulted in the recommendation that Congress allow domestic American telegraph carriers to merge, but with a proviso that ". . . there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity . . . ." *Id.* at 25. As to operations of the merged entity, the Committee proposed:

> "(d) The legislation should define 'domestic' and 'international' carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, *and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest." Id.* (Emphasis added.)

The reasons for such restrictions on the merged domestic carrier was that, with the demise of Postal Telegraph Company, WU was expected to acquire a monopoly in "ordinary commercial messenger business within the United States." *Id.* at 20. WU also had extensive international operations. It could, therefore, by coordinating both aspects of its business, seriously damage the interests of competing international carriers, contrary to 47 U.S.C. §314.

These Senate recommendations were embodied in S. 2445—a proposed, but not enacted, version of §222—which would have allowed the merger of domestic and international carriers, respectively, into two separate entities. As for the restriction on international operations

placed on the domestic carrier, the language of this bill was changed to "require" the FCC to bring about complete divestment "of all such international telegraph operations." *Hearings on S. 2445 Before a Sub-Committee of the Senate Committee on Interstate Commerce, (Consolidations and Mergers of Telegraph Operations)* 77th Cong., 2d Sess. at 253 (1942). The final version of §222(c)(2), quoted *supra*, left the FCC with only the authority to fix the time for divestiture. In short, the evolving language of the statute itself militates against a reading of §222(c)(2), as the FCC read it, to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC "broad and flexible powers to achieve those goals in the light of changing circumstances." Instead, in enacting this governing statute, Congress granted the FCC only the power to fix, in its discretion, the time within which the divestiture of international operations by domestic merged entities was to be accomplished. Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power.

Subsequent interpretations of §222(c)(2) by the FCC bear out the Commission's lack of discretion in applying this statute. In *Telegraph Service with Hawaii*, 28 F.C.C. 599, 605, *aff'd on reconsideration*, 29 F.C.C. 714 (1960), the FCC ruled that §222 did not allow WU to provide telegraph service to the islands upon Hawaii's admission as a State as part of WU's domestic telegraph operations. The FCC there felt that WU's interpretation of the statute, which would have included an evaluation of the public interest in allowing such a service, was incorrect. Instead, the FCC found that the history and purpose of §222 did not give rise to any "doubts as to means" so that the FCC could not allow WU to provide such a service "no matter how urgent the public interest." 28 F.C.C. at 605. Again

Congress was there cited as the only competent body to deal with WU's request. Further, one year after its decision in *Telegraph Service with Hawaii, supra,* the FCC found in *Western Union Divestment,* 30 F.C.C. 323, 340 (1961), that it was the intent of Congress in enacting §222 to achieve a complete divorcement of domestic carriers from all financial interest in international telegraph operations. The FCC's 1960 and 1961 reading of §222 are simply inconsistent with its current view[1] by which the

[1] The FCC supported its current reading of §222(c)(2) through *American Satellite Corporation,* 43 F.C.C.2d 348, 353-54 (1973) and *RCA Global Communications, Inc.,* 42 F.C.C.2d 774, 780 (1973). In *American Satellite,* the Commission did cite the "theretofore carried on" language of §222(c)(2) to explain that the term "record communications by wire or radio" as used in §222(a)(5) (the definition of "domestic telegraph operations") was intended to embrace those types of services being carried on by WU at the time of the merger. However, the case revolved around whether American Satellite, a new company owned jointly by Fairchild Industries and Western Union International, could receive authorization to lease satellite channels from Telestat Canada for domestic communications facilities. WU opposed the application on the grounds that WUI's 20% ownership of American Satellite constituted a merger between an international carrier (WUI) and a domestic carrier (American Satellite), contrary to §222(c)(2). This objection did not succeed, because the Commission did *not* find that American Satellite was a domestic carrier. As an international carrier, American Satellite could compete with WU domestically, because ". . . the legislative intent [of §222] was not to protect Western Union from competition in the domestic communications market. Rather, it was the intent of Congress to preserve the then existing competition in international communications which might be lessened or extinguished by the creation of the domestic telegraph monopoly authorized by Congress." 43 F.C.C.2d at 355. Such a view of §222 by the Commission which would continue to keep WU out of international operations is consistent with this court's view of the statute. The thrust of *RCA Global, supra,* is much the same as in *American Satellite, supra.*

Commission has now endowed itself with the power to include an evaluation of the public interest in allowing WU to file its application for mailgram service—an admittedly international operation by a domestic carrier. Accordingly, no special weight can be placed on the FCC's latest interpretation of §222, *United Housing Foundation Inc.* v. *Forman,* 421 U.S. 837, 858 n. 25 (1975), as would otherwise be the case, *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 121 (1973).

Continuing the analysis of the legislative history of §222, we now turn to the second issue raised by the FCC order which is whether §222(c)(2)'s divestiture requirement applied only to record (non-voice) services provided by WU in 1943. This construction of §222 would allow WU to apply for mailgram service to Hawaii, because the FCC has found that while the mailgram is "clearly a record service," it is nonetheless a "new service distinct from those offered in 1943." Implicit therein is the view that the statute was solely applicable to the industry's problems and operations literally and precisely as they existed in 1943 and that the legislation was not meant to have any prospective application. This court is satisfied, however, that there is no basis whatever in the legislative history to support so limited and strained a construction.

The 1942 congressional hearings on S. 2445, one of two predecessors to the current §222, reveal that the FCC at that time considered the legislation as the beginning of a major and long-term reorganization of the telegraph industry. FCC Chairman James L. Fly told the Committee that:

> "As time has gone on, I must say that I have become more and more impressed with the utter necessity,

> and I think at an early date, of having an effective worldwide scheme of communications. . . . [The need] is pretty acute in time of war. . . .
>
> But it is going to be immensely important when this war is over." *Hearings on S. 2445 Before a Subcommittee of the Senate Committee on Interstate Commerce, (Consolidations and Mergers of Telegraph Operations)* 77th Cong., 2d Sess. at 253 (1942).

FCC Commissioner Clifford T. Durr, likewise saw the legislation as a "long step" toward the creation of a domestic industry comprised of only a single domestic and a single international carrier. *Id.* at 14. Moreover, around this time the affected domestic companies, including WU, evidently suggested that they be allowed to retain "international facilities." Chairman Fly disagreed and said:

> "I strongly feel that we ought to do a clean job of handling this problem. . . . [I]f we decide that as a matter of policy that there should be a domestic monoply . . . then I do think we ought to do a clean job of it." *Id.* at 258.

At the urging of the Navy Department, however, S. 2445 was changed from a measure authorizing mergers of both domestic and international carriers to one allowing only mergers among domestic carriers. S. Rep. No. 1490, 77th Cong., 2d Sess. at 8 (1942). At the House hearings on the new measure, S. 2598, FCC Chairman Fly again commented that "we do not want the domestic company to have any international arrangements; that is, any international properties or operations." *Hearings Pursuant to S. 2598 Before a Subcommittee of the House Committee on Interstate & Foreign Commerce, (Consolidations and Mergers of Telegraph Operations)*, 77th Cong., 2d Sess. at 16 (1942).

The plain import of these statements, when taken together with the evolving language of the statute as discussed *supra,* leads to the conclusion that the intent and purpose of Congress in enacting §222(c)(2) was more than simply barring domestic carriers from engaging in the particular international operations and services that were being provided in 1943. The FCC's heavy reliance on the "theretofore" language of §222(c)(2), *supra,* is, therefore, unjustified. The word "theretofore" must be placed in its proper context by looking at the legislative history as a whole, *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972), which does not reveal an intent by Congress to use the word as a line of demarcation for the types of international record services which WU could or could not engage in after the merger with Postal Telegraph. To hold otherwise would not only give the word "theretofore" a strained meaning, but would imply that WU could defeat the import of the congressional scheme of §222 by re-entering international operations shortly after its mandated divestiture by developing or acquiring interests in modes of record communications, other than standard telegraph service, not engaged in by the company in 1943. *See also, The Western Union Telegraph Co., supra,* 55 F.C.C.2d at 680. Congress was, of course, aware of forms of record message services other than telegrams during the period when this legislation was under study, including the Bell System's TWX, a teletypewriter exchange service, and its leased-wire service. *See Recommendations of Three Proposed Amendments to the Communications Act of 1934,* H. Doc. No. 83, 74th Cong., 1st Sess. at 5 (1935) and *Hearings pursuant to S. No. 95 Before a Subcommittee of The Senate Committee on Interstate Commerce, (Statement of FCC Chairman Fly),* 77th Cong., 1st Sess. at 5, 19 (1941).

It is clear that in 1962 WU was in full agreement with this court's present interpretation of §222(c)(2). This is evidenced by WU's attempt in that year to bring about the repeal of that section. The thrust of the bill, which was never enacted into law, was to allow WU to compete with A. T. & T. by engaging in international data transmission, which, like mailgrams, was a new type of record service. The FCC opposed such a repeal. This action shows that at that time the FCC was of the opinion that §222(c)(2) was intended to preclude WU from engaging in international record services in existence prior *and subsequent to* 1943.

In short, §222(c)(2)'s directive as to the divestment by the merged domestic carrier (WU) of "international telegraph operations theretofore carried on by any party to the consolidation or merger" was meant as a continuing bar to WU's involvement in international record communications which would include mailgrams. This was the price paid by the company for the acquisition of a domestic monopoly over telegraph service. Accordingly, the issue of whether mailgrams are a "new" form of record service unknown to the drafters of the 1943 legislation need not be reached or discussed.

Thus, consistent with the Circuit's earlier opinion in *Western Union Telegraph Co.* v. *United States,* 267 F.2d 715, 718 (2 Cir. 1959), §222(c)(2) precludes the FCC's consideration of an application by The Western Union Telegraph Co. to provide an admittedly international record service to Hawaii. In the light of the disposition of the case, the merits of antitrust allegations urged by intervenor ITT World Communications Inc. need not be discussed or commented upon.

Because it was Congress that enacted the statute and imposed this ban on WU, it is only Congress that, under the circumstances of this case, can change it.

The order of the FCC is vacated and set aside.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that both the plain language of §222 of the Federal Communications Act of 1934 ("Act") and the circumstances surrounding its enactment make it clear that in authorizing Western Union Telegraph Company ("WU") and Postal Telegraph, Inc. ("PT") to merge, Congress did not bar the merged enterprise from ever again entering into any international operations. If Congress had wished to enact such a prohibition, it could easily have done so. All it had to do was to provide that following divestiture the merged enterprise should not engage in international operations or that it should be restricted to domestic service. But it did not do this. Instead, it simply required that the merged enterprise divest itself of those *"international operations theretofore carried on."* The term "theretofore" can only mean "up to that time," "until then," or "before then," see Webster's Third International Dict. (1961 ed.) 2372; *Hume* v. *United States,* 118 Fed. 689, 696 (5th Cir. 1902). It cannot fairly be construed as meaning "thereafter." As the Supreme Court has stated, "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Railway Co.,* 343 U.S. 562, 575 (1952). "[W]e are not free to adopt a construction which not only strains, but flatly contradicts, the words of the statute," *Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U.S. 418, 427 (1972).

Congress thus left open the question of whether, with changing market conditions, circumstances and technologies, some international operations by WU might after divestiture be authorized by the Federal Communications Commission as being in the public interest. Since WU has complied with the divestiture requirement, that obligation has been fulfilled, and the FCC is no longer barred from authorizing the proposed mailgram service to Hawaii, an international point. I would therefore affirm the Commission's order.

That Congress intended to restrict itself to dealing with the telegraphic industry in its contemporary pattern is attested to not only by the statute's plain language but by the circumstances surrounding the enactment of §222. Although the statute is couched in terms that embrace any merger of telegraphic carriers generally, it is undisputed that the law was in fact aimed at authorizing the proposed merger of WU with its financially ailing competitor, PT, which had continued to lose money despite government subsidization through the Reconstruction Finance Corp. See H.R. Rep. No. 2664, 77th Cong., 2d Sess. 3-4 (1942), S. Rep. No. 1490, 77th Cong., 2d Sess. 1 (1942). These two companies represented the country's sole domestic telegraphic services except for certain limited types of service (leased wire, teletypewriter and telephone) offered by American Telephone & Telegraph Company. If PT should fail, the United States would lose an essential telegraphic service. Sen. Res. 75, 76th Cong., 1st Sess. 1939. Congressional authority for the proposed merger was required because the merger otherwise would violate §314 of the Act, 47 U.S.C. §314.

Since the WU-PT merger would create overnight a giant domestic-international telegraphic enterprise possessing a domestic monopoly over pick-up and delivery of

international messages, which could be used unfairly to favor its international cables division as against the overseas services of other international carriers, some protection against this immediate potential for abuse was deemed advisable. The means chosen were to require divestiture of the merged company's international operations and, pending divestiture, to impose upon WU a formula for equitable distribution among international carriers of international traffic picked up by WU for transmittal overseas. Not a word was said about depriving the Commission of its discretionary power under §214 of the Act to authorize in the future such specific international operations by WU as might be found to be in the public interest.

Congress thus viewed divestiture as sufficient to eliminate any immediate anticompetitive consequences from the merger and saw the Commission's continued exercise of its broad discretionary powers and expertise as sufficient to safeguard against any reentry by WU that might tend to cause an undue restraint on competition. In the meantime, competition on the part of international carriers would be given a chance to flourish.

Normally, where the plain meaning of a statute is clear legislative history, even if indicating a different intent, will not justify a departure from that meaning. See *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917). Here, however, the legislative history of §222, far from lending support to the majority's position, tends to point in the opposite direction. The excerpts of testimony selected by the majority from statements of those who appeared in the course of Committee hearings extending over a period of years are at best ambiguous. Furthermore, being the statements of individuals rather than of Congressional committees or members, they hardly reflect the views of

the Senate and House Committees reporting on the proposed legislation, much less those of Congress. When we turn to the Committee reports, as distinguished from such testimony, we find that there was never any recommendation to the effect that the merged enterprise be barred from international operations. At most the Senate Committee on Interstate Commerce recommended that the Commission be given the power to restrict the merged enterprise to domestic operations if such a restriction should be "found to be in the public interest." S. Rep. No. 769, p. 25. Thereafter the successive drafts of §222 as they progressed through Congress toward final enactment all contained the language "theretofore carried on." See S. 158, 78th Cong., 1st Sess. (1943); S. 2598, 77th Cong., 2d Sess. (1942); S. 2445, 77th Cong., 2d Sess. (1942). Thus the legislative history, to the extent that it sheds any light on the issue, indicates that Congress meant what it said when it used the phrase "theretofore carried on" and left it to the Commission to determine in its discretion whether WU might be permitted to enter the international market "if found to be in the public interest" or, for that matter, whether an international carrier might expand by growth (as distinguished from merger) into the domestic market.[1]

Just as divestiture in the antitrust context is not normally a bar to future competition through growth on the part of the divested company, at least in the absence of a specific prohibition against reentry, see, e.g., *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U.S. 458, 462, 472-73 (1960); *Schine Chain Theaters, Inc.* v. *United States,* 334 U.S. 110, 127, 130 (1948); *United*

[1] Section 222 of the Communications Act, 47 U.S.C. §222, is limited to placing restrictions on consolidations and mergers. It does not restrict expansion by a domestic or international carrier through growth.

States v. *Crescent Amusement Co.,* 323 U.S. 173, 186 (1944), so here Congress was apparently satisifed to allow the Commission to determine in the exercise of its broad authority whether WU might enter the international area, and, if so, to what extent. Any such determination would, of course, require the Commission to weigh the advantages to the public of permitting a specific or limited reentry against any risk of abuse of domestic monopoly power on the part of WU. As competitive conditions, marketing methods and technology (including the development of alternate-voice data transmission) might change, such flexibility would be both desirable and in the public interest, especially since new methods of protecting international carriers against unfair competition might be devised. For instance, it now appears that the FCC could promote competition in the transmittal of mailgrams to Hawaii (1) by expanding the international gateways in the United States and permitting international carriers to absorb the cost of transmitting messages domestically by phone, telex or TWIX to such gateways, thus providing "paid direct access" to all domestic points in the United States, see *International Record Carriers' Communications,* 40 F.C.C.2d 1082, 1083 (1973), and (2) by granting Hawaii mailgram rights to one or more international carriers.[2] In view of these changing circumstances, §222, to the extent that it might restrain competition on the part of WU against the international carriers, should be construed strictly, see *United States* v. *Masonite,* 316 U.S. 265, 280 (1942).

[2] Since 1972, WUI, RCA and ITT have applied to the Commission for permission to provide services similar to WU's mailgram service between the continental United States and various international points, including Hawaii.

Nor does *Telegraphic Service With Hawaii,* 28 F.C.C. 599, *affd. on reconsideration,* 29 F.C.C. 714 (1960), provide any substantial support for the majority's construction of §222. Although the Commission in that proceeding stated in passing that §222 precluded WU from engaging in competition with international carriers to overseas points, the statement was made in connection with its consideration of whether Hawaii might be treated as a domestic rather than as an international point. Furthermore, since the statement was made before WU's divestiture of its international operations, which did not occur until 1963, the Commission apparently assumed that since Hawaii remained an international point any WU service to Hawaii would be subject to the outstanding divestiture order. However, since WU has now complied with the divestiture order, it no longer applies. To the extent that the Commission's statement in *Telegraphic Service With Hawaii* is offered as an interpretation of §222 supporting the majority's position here, it has been greatly eroded by the Commission's decisions in later cases, see *American Satellite Corp.,* 43 F.C.C.2d 348, 353 (1973); *RCA Global Communications, Inc.,* 42 F.C.C.2d 774, 780 (1973), and as a practical matter overruled by its decision in the present case. In view of this conflict, whatever weight might otherwise be accorded to the Commission's earlier interpretation of its own statute, see *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956), has been dissipated by its later construction. See *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858-59 n.25 (1975).

In short, the Commission's conclusion that it has authority to consider WU's application here is in keeping with the pattern and scheme of the Act, which is to set forth legislative objectives and give broad authority to the

FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in the light of changing technology and market developments. See *United States* v. *Southwestern Cable,* 392 U.S. 157, 172-73 (1968). The public interest would not be served by treating §222(c)(ii) as a straitjacket that would preclude WU's provision of international mailgram service where the grant of a certificate to provide such service to Hawaii would be in the public interest and would not violate the plain language of §222. I would therefore affirm the Commission's order.

APPENDIX B
JUDGMENT

United States Court of Appeals
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of October, one thousand nine hundred and seventy-six.

Present:

HON. ROBERT P. ANDERSON,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN, C.JJ.
Circuit Judges.

WESTERN UNION INTERNATIONAL, INC.
Petitioner,

v.

THE FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,
Respondents,

75-4132

WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII AND ITT WORLD COMMUNICATIONS INC.
Intervenors.

A petition for review of an order of the Federal Communications Commission.

This cause came on to be heard and was argued by counsel

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that said petition to review be and it hereby is granted and that the said order be and it hereby is vacated and set aside.

A. DANIEL FUSARO,
Clerk

By: VINCENT A CURTAIN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for a rehearing having been filed herein by counsel for the respondent (Western Union Telegraph Company).

Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the respondent (Western Union Telegraph Company), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for a rehearing having been filed herein by counsel for the respondent (Federal Communications Commission).

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the respondent (Federal Communications Commission), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
THE WESTERN UNION TELEGRAPH CO.
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, To Lease and To Operate Facilities To Extend Mailgram Service Between the U.S. Mainland and Hawaii

MEMORANDUM OPINION AND ORDER

(Adopted June 11, 1975; Released June 23, 1975)

BY THE COMMISSION: COMMISSIONER REID CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission is herein considering:

(a) An application for Review of Action taken Pursuant to Delegated Authority filed by The Western Union Telegraph Company (WU) on May 19, 1972, requesting that the Commission, pursuant to Section 1.115 of our Rules and Regulations, review the determination made by the Chief, Common Carrier Bureau (Bureau), that WU is prohibited by Section 222 of the Communications Act of 1934, 47 U.S.C. §222 (1971), from leasing and operating facilities to extend Mailgram

service between the United States Mainland and Hawaii;[1]

(b) An Opposition to WU's Application for Review (Opposition) filed by RCA Global Communications, Inc. (RCA) on June 26, 1972, urging that the Bureau was correct in its determination that Section 222 is an absolute bar to WU's engaging in any overseas telegraph operations;

(c) A petition for Waiver filed pursuant to Section 1.3 of the Commission's Rules and Regulations, 47 C.F.R. §1.3 (1973), by Western Union International, Inc. (WUI) on June 26, 1972, requesting that the Commission waive the requirements set forth in Sections 1.115(f) and 1.49 of its Rules;

(d) A Petition of WUI to Dismiss or Deny (WU's) Application for Review (Petition) filed June 26, 1972, asserting that as a matter of law, under Section 222, WU is precluded from providing international record services;

(e) A Reply by WU to the RCA Opposition and the WUI Petition to dismiss its Application for Review (Reply), filed July 25, 1972;

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[1] On April 4, 1972, WU filed an Application for Authority Pursuant to Section 214 of the Communications Act to lease and operate facilities to extend Mailgram service between the United States and Hawaii. The Chief, Common Carrier Bureau, pursuant to Section 0.294 (now 0.291) of the Commission's Rules and Regulations, 47 C.F.R. §0.294 (1973), determined that the FCC was unable to accept WU's application for filing because Section 222 prohibited the applicant as a matter of law from providing the proposed Mailgram service. Letter of Chief, Common Carrier Bureau dated April 19, 1972.

(f) A Petition for Permission to File Additional Pleadings, filed by WUI on August 11, 1972, requesting permission to file a pleading in response to WU's Reply;

(g) Comments of WUI filed August 11, 1972, in response to the WU Reply dated July 25, 1972;

(h) An Opposition to WUI's Petition for Permission to File an Additional Pleading filed on August 28, 1972 by WU; and

(i) A Reply to WU's opposition to WUI's Petition for Permission to file an Additional Pleading, filed by WUI on September 6, 1972.

Positions of the Parties

2. In its Application for Review, WU requests the Commission to review and reverse the Bureau's determination that Section 222 of the Communications Act prohibits WU from providing Mailgram service between the United States Mainland and the State of Hawaii. WU argues that the Bureau incorrectly interpreted the divestment requirement of Section 222(c)(2) too broadly as a pervasive restriction on the scope of WU's activities and that such an interpretation is not warranted by the language of the statute.[2] In support of its contention, WU advances two alternative arguments. First, WU argues

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[2] Section 222(c)(2), the so-called "divestment clause," provides in pertinent part that:

> Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger. . . .

This legislation was enacted to permit WU to acquire its sole domestic competitor, Postal Telegraph Cable Company, and thereby achieve a monopoly position for domestic telegraph operations. For a discussion of the legislative history, see the Appendix hereto.

that the Commission is empowered to authorize re-entry of WU into international telegraph operations. In support of this argument, WU asserts that the statute does not specifically state that WU is barred from any future international telegraph operations; that if Congress had intended such a bar, it would have so stated. WU further claims that the Bureau misinterpreted the legislative history of the statute, and that a correct reading thereof supports its contention that WU may be authorized to provide such international or overseas services as the Commission finds to be in the public interest. WU also argues that the divestment requirement should be narrowly construed since it represents a restriction on its conduct of business and that public policy disfavors such restrictions. Finally, WU argues that, since exclusion is not mandated by the statutory language or the legislative history, a broad interpretation of the provision would unnecessarily frustrate the general regulatory policy of allowing regulatory agencies flexibility in dealing with problems under changing circumstances. Alternatively, WU argues that, assuming *arguendo* that the divestment clause does bar WU re-entry into the international or overseas operations of which it divested itself, that bar would apply only to those telegraph operations "theretofore carried on." [3] WU contends that since Mailgram is a "new service", which it did not provide at the time Section 222 was enacted and which was not among the operations divested, we cannot validly interpret the divestment requirement as a bar to authorizing WU to provide Mailgram internationally, or to Hawaii.

3. WU's request for review is opposed by RCA and WUI, which both urge the Commission to affirm the

[3] *See* footnote 2, *supra.*

Bureau's action.[4] Essentially, the opponents challenge WU's assertion that the Commission is empowered to authorize WU re-entry into international telegraph operations and argue that the only correct interpretation of the divestment clause is as an absolute and permanent bar on any form of international or overseas telegraph operations by WU. Restriction to domestic telegraph operations is, they argue, the price WU had to pay for permission to merge with the Postal Telegraph Cable Co. (Postal). It points out that WU was not required to effect the merger, but voluntarily chose to do so, with knowledge of the divestment requirement. RCA and WUI argue that the absence of a time limit on the divestment requirement, contrary to WU's position, indicates that Congress intended a permanent ban on WU international telegraph operations. Both opponents assert that it is clear from the legislative history that Congress intended WU permanently to be disqualified from competing with the International Record Carriers (IRC's) so long as it had a domestic telegraph monopoly which would enable it unfairly to favor its own international operations. Since WU still has that monopoly, and is still able to favor itself to the detriment of the IRC's, the purposes prompting inclusion of the divestment requirement remain valid and the bar on WU international operations necessary. The opponents also challenge WU's alternative argument on the question of "new" telegraphic services. Since they view Section 222 as a permanent bar on WU international operations, they claim that the "new service" distinction is without merit. They see no support in the statute or its legislative history for WU's interpretation of the statutory

[4] In connection with its Petition to Dismiss, WUI filed a request for waiver of the Rules relating to formal requirements of pleadings. So that we can have the benefits of WUI's views, we grant the request for waiver and accept WUI's Petition for consideration herein.

language "international telegraph operations theretofore carried on." Assuming, however, that WU is correct, RCA argues that Mailgram in any event is not so different from traditional public message telegraph service (PMS) that it could reasonably be classified as a distinct service. RCA points out that mail delivery of telegrams has been provided for in carrier tariffs for many years. In conclusion, the opponents request that the Commission dismiss the WU Application for Review as unwarranted, or to affirm the Bureau's action.[5]

Discussion and Conclusions

4. As disclosed by the pleadings herein, we are faced with the narrow legal question whether the Bureau correctly interpreted the divestment clause of Section 222(c)(2) as a permanent bar to WU international or overseas telegraph operations. In deciding this question we must of course bear in mind the totality of our responsibilities under the Communications Act and the requirements of the public interest, the touchstone standard of this Act. If we find Section 222 a bar, we must uphold the Bureau's refusal to accept WU's application for authority to provide Mailgram Service between the

[5] WU filed a reply to the oppositions reiterating the arguments in its Application for Review and asserting that neither WUI nor RCA had shown anything which disproved its arguments. WUI filed a request for permission to file an additional pleading in response to WU's Reply. This request was opposed by WU and WUI filed comments on WU's opposition. We believe that the complexity of the issues in this case call for a full exposition of the views of interested parties. Accordingly, we grant WUI's request for permission to file a special pleading. The only new argument raised by WUI in this pleading is an attack on an argument in WU's reply that economic factors had coerced it into merging with Postal. Since our decision herein does not turn on the voluntariness of the merger, we do not have to resolve the dispute thus set forth in these pleadings.

United States mainland and Hawaii. At the outset, it is clear that Hawaii is an international point for purposes of Section 222, despite the fact that it is a State. As we held in *Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960), Congress, in drafting Section 222, was concerned with the geographical location of service points, rather than with their political status in classifying them as domestic or international. Moreover, after Hawaii was admitted as a State, Congress amended the Act to provide that it continues to be an international or overseas point for purposes of Section 222. *See* Section 222(a)(10) which excludes Hawaii from the term "Continental United States" as used in Section 222.[6] Further, it is clear that Mailgram is a record, as opposed to voice, service, and hence falls within the Section 222 definition of "telegraph operations."[7] Thus, a grant of WU's application for authority to provide Mailgram service to Hawaii would involve WU in international telegraph operations, and

[6] Public Law 86-624 (July 12, 1960). Prior to the amendment, the section defined "Continental United States" as "the several States and the District of Columbia." Section 222(a)(6) defines "international telegraph operations" as

> acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the *continental United States,* Alaska, Canada, Saint-Pierre-Miquelon, Mexico and Newfoundland. . . . (emphasis added).

By excluding Hawaii from the definition of continental United States, Congress indicated that record communications between the United States Mainland and Hawaii were to be regarded as international rather than domestic.

[7] Section 222(a)(5) defines "domestic telegraph operations" and Section 222(a)(6) defines "international telegraph operations." In both instances, the operative words are "record communications by wire or radio."

would represent the first time WU has engaged in such operations since divestment of its international facilities in 1963.

5. RCA and WUI argue for a broad interpretation of the divestment clause which would impose an absolute and permanent ban on WU international telegraph operations, while WU seeks a narrow construction which would permit it to re-enter the international arena to a limited extent. While we have had occasion in the past to interpret the requirements of the divestment clause, we were there concerned with such matters as whether WU was required to effect divestment[8] or whether it could expand its historical services into areas not previously served.[9] The precise issue raised by the instant pleadings; that is the effect of the divestment clause on proposals to provide a service not covered by the express statutory language, presents a case of first impression. After careful review of all relevant matters, we find nothing in the statute or its legislative history which mandates a broad interpretation of the divestment clause such as to disqualify WU from providing the proposed Mailgram service to Hawaii. From our reading of the statute and its legislative history, we conclude that Congress in enacting Section 222 did not intend to divide the communications market between international and domestic carriers. If it had, then certainly Section 222 would have applied to all carriers present and future, and not just WU. Rather, it simply was seeking to remedy the problems which were facing the troubled telegraph industry in 1943. The restrictions placed on the parties to the merger were ancillary to this main purpose. The restrictions, taken as a whole, were designed only to prevent abuses by WU which might flow from its position as the sole domestic

[8] Western Union Telegraph Co., 25 F.C.C. 35 (1958).
[9] Telegraph Service with Hawaii, 28 F.C.C. 599 (1960).

entity with extensive public message operations in the continental United States. This Congress accomplished in essentially two ways: (1) the divestment clause in Section 222 (c)(2); and (2) the imposition under Section 222 (e)(1) of a formula to govern distribution by it among the IRC's of outbound international message telegrams pending divestment. In construing the divestment clause we must look to the intent of Congress in including it and effectuate that intent. As we view Congressional intent, we do not believe that it requires a sweeping prohibition on WU international operations to prevent abuses. Moreover, we believe that the public interest would be best served by including WU among those who are being considered as potential suppliers of this type of service to Hawaii. Accordingly, for the reasons set forth below, we conclude that the Bureau's action was erroneous, and that WU's Application for Authority should be accepted for filing and consideration on the merits.[10]

6. Under Section 1 of the Communications Act, we have an express duty to assure the people of the United States rapid and efficient communications services at reasonable charges. The rapid growth rate of WU's Mailgram service on the mainland suggests that the service is popular and that it is filling a need. Since its introduction in 1970, WU has steadily expanded the availability and flexibility of Mailgram service. For example, Mailgram service is presently available for messages inbound to the United States from Canada and WU is negotiating for an early

[10] WUI also argues that Section 2.18 of the September 15, 1960 Agreement between it and WU under which WUI acquired WU's international facilities and operations would bar WU from providing Mailgram service to Hawaii. We have considered the language of the clause and do not construe it so.

introduction of outbound service to Canada.[11] Also, WU offers both-way Mailgram service to Alaska through interconnection with RCA Alaska Communications, Inc. We believe that the people of Hawaii are entitled to the benefits of this service, and should not be deprived of the opportunity to have it provided by WU, in the event that we should determine that WU's proposal is superior to other pending applications. Throughout the Communications Act, Congress has made clear that it was not imposing strict limitations on the power of the Commission. Rather it has stated broad legislative goals and given the Commission broad and flexible powers to achieve those goals in the light of changing circumstances.[12] We see nothing in the legislative history of the statute which requires us mechanically to disqualify WU from the chance to provide this service without considering the merits and benefits of its proposal. In the absence of an express statutory bar, we believe the public interest will be served by retaining maximum flexibility to decide the question of Mailgram service to Hawaii.

7. We decide herein only that WU should have the opportunity to pursue its application before this Commission but do not pass on its merits. We note that in addition to the WU proposal, there are pending before us applications for authority to provide a service similar to Mailgram filed by RCA, ITT, WUI ("Telepost"), The Hawaiian Telephone Co. ("Mailgram") in connection

[11] Under Section 222, service between the United States and Canada is considered domestic telegraph operations, 47 U.S.C. *See* § 222(a)(5) (1971).

[12] *See, e.g.,* United States v. Southwestern Cable Co., 392 U.S. 157 (1966), United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

with WU,[13] and the Domestic Satellite Corporation ("Lettergram"). There are both similarities and significant differences among these proposals. Thus, our action only permits WU's application to be considered along with the other applications. The decision as to which carrier or carriers shall be authorized to provide this service to Hawaii will be made by subsequent order, after we have had an opportunity to consider which proposals best serve the public interest.

8. With respect to Section 222, we have previously ruled in considering the domestic satellite applications of RCA and WUI that this Section applies only to record services of the nature "theretofore carried on by WU" at the time Section 222 was enacted in 1943, principally message telegraph service. *See American Satellite Corporation,* 43 F.C.C. 2d 348, 353—354 (1973), *RCA Global Communications, Inc., et al.,* 42 F.C.C. 2d 774, 780 (1973). In our judgment, Mailgram service constitutes a new and distinctly different service from public message telegraph service of the kind Congress was contemplating in 1943. Before amplifying these views, we point out further that insofar as competition to the record carriers is concerned, any entity other than WU would be clearly eligible to seek entry in competition with the record carriers to provide this type of service to Hawaii. On the basis of the record before us, we see no potential for abuses by WU of the type that concerned Congress in enacting the divestment clause. It might well be that in our subsequent review of the applications to provide

[13] At the time Hawaiian's application was filed, Hawaiian had an agreement with WU jointly to provide the service. Since that time, WU has indicated its desire to withdraw from the agreement. Hawaiian has stated that it wishes to pursue its application notwithstanding WU's desire to withdraw.

Mailgram-like service to Hawaii, we will authorize only one carrier to provide that service. In view of the possibility of a single carrier, we would want all applications before us to consider. If, on the other hand, we authorize more than one carrier to provide service, we cannot assume that any competitor will act unfairly. However, if at any time it appears that such problems exist, we have ample authority under the Act to take necessary actions to rectify abuses short of a sweeping prohibition. In other words, we do not construe Section 222 as affording the record carriers any umbrella protection from competition found to be in the public interest on communications grounds.

9. We turn now to our conclusion that Mailgram is a new service distinct from those offered in 1943. While Mailgram is clearly a record service, it has special characteristics that make it different from traditional services. In its Application for Review, WU characterizes Mailgram as "a new innovative service provided by WU under joint arrangement with the United States Postal Service." The salient characteristics of Mailgram is that the delivery function is the responsibility of the Postal Service rather than WU as in the case of PMS. Essentially, Mailgram may be classed as "electronic mail" which combines some aspects of a traditional telegram with those of mail into a hybrid form which is identical to neither. Operationally, Mailgrams are accepted by WU on the Mainland by various means available for pick-up of PMS messages, including telephone (Centralized Telephone Bureau), Telex, TWX, tieline, over the counter, messenger, and facsimile.[14] The Mailgrams are then transmitted over

[14] Mailgrams, but not PMS, may also be filed by submission to WU of specially-prepared magnetic tapes and by direct computer transmission.

telegraph company circuits to its computer switching center in Middletown, Virginia. At Middletown, the computer routes the Mailgrams over circuits specifically dedicated to Mailgram service to a preselected Post Office (called a Serving Post Office or SPO) serving the Zip Code area designated in the address. At the SPO, the Mailgram message is received on a burster teleprinter supplied by WU which prints it on special paper. A Postal Service employee then inserts it into a special envelope and places it in the mails for delivery with the next regular mail delivery. According to WU, the service standard for Mailgram is next business-day delivery, although difference in time zones across the country raise the possibility of same-day delivery in some cases.

10. As we noted above the principal difference between Mailgrams and PMS is that Mailgrams are ultimately delivered by the Postal Service which, accordingly, bears total responsibility for their delivery. WU merely accepts the originating customer's message and transmits it electronically to the SPO. The service is thus subject to the practices of the Postal Service while message telegrams are not. In the case of PMS, however, the customer is seeking rapid, reliable delivery of his message for which a written record is avaliable. For a full-rate telegram, WU is obligated to make a first delivery attempt within five hours of receipt, or the customer is entitled to a refund of the charges.[15] Even for the Overnight Telegram (OT), which might be considered more closely to resemble Mailgram, WU has full responsibility for delivery, a

[15] The standard for messages delivered by telephone or tieline (including Telex and TWX) is two hours and five hours for messenger delivery.

specified time in which to attempt delivery, and an obligation to refund charges if the standard is not met.[16]

11. In the case of Mailgrams, the Postal Service makes no guarantee as to the date or time of delivery, or even that delivery will occur, and does not provide for refunds for non-delivery.[17] The service typically features next

[16] While this class more closely resembles Mailgram service than does the full-rate telegram, there are differences here as well. An OT message is accepted for delivery "not earlier than the following morning." WU Tariff F.C.C. No. 255 at p. 25. An OT is not transmitted to the delivery office until all higher classes have been sent, while a Mailgram generally is transmitted instantaneously to the SPO. OT's are delivered by the various means used for a full-rate message—telephone, tieline, and messenger (upon payment of the $3.00 delivery charge)—while Mailgrams are delivered only by the Postal Service. Thus, OT's may be delivered on Sundays and holidays when there is no mail delivery. Further, in the rare cases where time zone differences permit, Mailgrams can be delivered on the same day they were filed while OT's cannot. WU is required to attempt delivery of OT's by 2:00 P.M. of the day following filing or refund the charges. Finally, the tariff charges for OT's are somewhat higher than those for some classes of Mailgrams ($4.00 for up to 100 words for OT's, as opposed to $2.50 for a Mailgram of the same length) and the name-to, address, and signature are not counted as chargeable words in an OT. We conclude from these differences that OT's constitute a separate service from Mailgram.

[17] For the limited class of Mailgrams filed on magnetic tape or by direct computer transmission, a certified delivery service analogous to certified mail is available upon payment of an additional $.60 charge. Under this arrangement, the Postal Service will (1) obtain the signature of the addressee, or the person at the same address accepting delivery, on a form supplied by the Postal Service to certify delivery has been made, (2) obtain the recipient's signature on a separate Postal Service return receipt form, and (3) forward the receipt to WU for return to the sender. In the event the sender fails to receive the receipt within 30 days, WU's tariff provides that the sender's recourse is against the Postal Service directly in accordance with Postal Service procedures. The certified delivery feature is not available for Mailgrams filed over-the-counter or by telephone or tieline. See WU Tariff F.C.C. No. 260, pp. 7—8 (Rule 4.2.6), 9. 1—10 (Rules 4.3.13 and 4.3.14), and 19(Rule 5.6).

business-day delivery, but the customer requiring positive delivery within a specified time cannot rely on this objective. Further, a significant portion of PMS traffic arises in connection with money orders and for this purpose Mailgrams are presently unsuitable.

12. Acknowledging the basic differences in delivery methods and responsibilities, the charges for Mailgram and PMS respectively differ substantially both as to rate levels and as to pricing practices. The rates for a full-rate message telegram are significantly higher than those for a Mailgram. The basic charge for a full-rate telegram is $4.75 for a minimum of 15 words (with decreasing additional charges for each word over 15) plus a supplemental charge of $3.00 where messenger delivery is specified. For domestic Mailgrams originated by telephone, tie-line, or over the counter, the charge is $2.50 for 100 words or less ($1.00 for each additional block of 100 words or less). For Mailgrams originated over Telex or TWX, charges vary according to rate areas established by WU. Because the same minimum charge applies to any Mailgram of less than 100 words, regardless of the actual number of chargeable words, the wordcount function is simplified or, in many cases, eliminated. In this connection, we note that for Mailgram, but not for PMS, the name-to, address, and signature are classed as chargeable words.[18]

[18] We note that PMS usage has been declining for many years. The IRC's argue that Mailgram has contributed to this decline. While this is no doubt true, the mere fact that for some users Mailgram provides a substitute for PMS, does not mean that it is identical therewith. The decline in PMS is also traceable in part to increased use of Telex, TWX, leased-channel service, telephone, and even air mail. None of the IRC's have argued that these media are therefore the same as PMS.

13. There is attached as an Appendix a Memorandum setting forth the basis for our view that neither the terms nor the legislative history of Section 222 require the conclusion that WU is statutorily barred from seeking authority to provide Mailgram service to Hawaii. This Appendix also discusses various administrative precedents which some of the parties assert to be relevant. Upon consideration of all of the foregoing and the Appendix we conclude that the divestment clause of Section 222 is not a bar to WU's providing Mailgram to Hawaii. We hold that WU's application to provide Mailgram service to Hawaii is acceptable for filing and comparative consideration.[19]

14. Accordingly, IT IS ORDERED, Pursuant to Section 1.115 of the Commission's Rules and Regulations, that the Application for Review of Action taken Pursuant to Delegated Authority filed by The Western Union Telegraph Company in the above-captioned proceeding is, to the extent provided for herein, GRANTED, but is otherwise DENIED in all respects; and that the Chief, Common Carrier Bureau is directed to accept for filing the Appli-

[19] On February 21, 1975, WUI filed a request for oral argument before the Commission *en banc* to consider the general question whether WU is eligible under Section 222(a)(5) of the Act to provide any international telegraph services. Essentially, WUI asserts that such argument would be helpful to place "in clearer focus" the legal concepts in various pending Commission proceedings in which this general question is in issue. After reviewing WUI's arguments, we have determined to deny WUI's request. WUI and the other IRC's have pleaded on numerous occasions their arguments as to the applicability of Section 222 to WU. There is presently before us an adequate record for decision and we do not believe that the requested oral argument will materially assist us. Accordingly, we hereby deny WUI's request for oral argument. *See* FCC v. WJR The Goodwill Station, Inc., 337 U.S. 265, 276 (1949); NLRB v. Allied Distributing Corp., 297 F. 2d 629, 680—681 (10th Cir., 1961).

cation for Authority to provide Mailgram Service to Hawaii filed on April 4, 1972 by The Western Union Telegraph Company.

15. IT IS FURTHER ORDERED, That the Opposition to Application for Review of Action taken Pusuant to Delegated Authority filed by RCA Global Communications, Inc. and the Petition of Western Union International, Inc. to Dismiss or Deny Application for Review are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

MEMORANDUM ON SECTION 222, ITS LEGISLATIVE HISTORY AND VARIOUS COMMISSION PRECEDENTS

1. The "divestment" requirement underlying the present dispute is part of an overall legislative package in Section 222 which was added to the Act in 1943 to permit the merger of Western Union Telegraph Company (WU) and Postal Telegraph Cable Company (Postal). To place the matter in its proper perspective, it is necessary briefly to discuss the factual situation in which the divestment requirement arose. At the time Section 222 was being considered WU and Postal were the sole remaining domestic carriers providing nationwide public message telegraph service (PMS).[1] After World War I, Postal experienced a long-term decline in its revenues until, by 1943, it appeared to be in danger of bankruptcy. WU also had experienced a steady decline in revenues, but was in a stronger financial position than Postal. Congress was concerned over the state of both the domestic and international telegraph carriers and instituted a study of the industry to determine what should be done to guarantee that the nation would have a viable domestic telegraph message service.[2] Eventually, Congress settled on a merger of Postal and WU as the best means of accomplishing that goal. Therefore, Section 222 was enacted to remove the Section 314 prohibition on mergers of telegraph

[1] The American Telephone and Telegraph Co. (AT&T), in addition to its telephone service, offered record services (TWX and telegraph-grade leased channel services). AT&T's revenues from its record services were sufficient in 1943 to make it the second largest domestic telegraph carrier (after WU). However, AT&T did not provide message telegraph service.

[2] S. Res. 95, 76th Congress, 1st Session (1939).

carriers[3] and allow a voluntary merger.[4] Because the resulting merger would create in WU a domestic message telegraph monopoly, Congress included several ancillary provisions designed to prevent or control abuses it feared could result from that monopoly. It was particularly concerned by the fact that in addition to its domestic business, WU was also engaged in extensive international telegraph operations (through its Cables Division) in competition with the international record carriers (IRC's). Because WU would be able to use its virtual monopoly on the domestic pick up and delivery of international message telegrams unfairly to favor its Cables Division, Congress included the Section 222(c)(2) requirement that after merger, WU should divest itself of the "international telegraph operations" it "theretofore carried on." Congress also provided for a formula for division of international telegraph traffic picked up by WU among the international record carriers. *See* Section 222(e)(1). Pursuant to the divestment requirement, WU eventually sold its international operations to an independent entity that operates under the name Western Union International, Inc. (WUI).

[3] Section 314 of the Act, 47 U.S.C. § 314 (1970), provides that [N]o person engaged . . . in . . . transmitting and/or receiving for hire . . . communications or signals by radio . . . shall by purchase, lease, construction, or otherwise . . . acquire, own, control or operate any cable wire telegraph or telephone line or system between any place in any State . . . of the United States . . . if . . . the purpose is and/or effect thereof may be to lessen competition. . . .

[4] Congress was also concerned about the condition of the international record carriers (IRC's) and proposed legislation to permit them to merge as well. The provisions dealing with the international merger, however, were removed from the bill finally enacted as Section 222.

2. It is apparent from the statutory language that the divestment requirement does not impose upon WU an all-encompassing bar to future international or overseas operations. The operative language provides only that WU must divest itself of the international telegraph operations in which it had "theretofore" engaged. The pertinent question, therefore, is whether the legislative history reflects any intent not apparent in the statute on its face. RCA and WUI argue that there was a Congressional intent permanently to bar WU from international operations, as reflected in the legislative history.[5] However, as we read the legislative history, there appears to be nothing to mandate such a conclusion. Upon consideration of the history discussed below, we are of the view that the divestment provision should be interpreted to apply only to the types of operations engaged in by WU at the time of the merger in 1943. Since Mailgram was not among such services, WU is not barred from being authorized to provide Hawaii Mailgram service.

3. Essentially, WU argues in its Application for Review that the Commission was not deprived of discretion to authorize WU international operations.[6] WU finds support for this position in a recommendation of the Senate Committee on Interstate Commerce for a bill to authorize the telegraph merger. The Committee recommended *inter alia* that the legislation "empower the Federal Commu-

[5] WUI states that the statutory phrase "international telegraph operations theretofore carried on" is "merely descriptive of what was to be divested [by WU]." WUI, however, challenges WU's reading of that language and states that it "cannot reasonably be construed as conferring any rights upon WU to overturn the entire statutory scheme by re-entering or re-acquiring international operations." Petition of Western Union International, Inc. to Dismiss or Deny Application for Review at p. 36.

[6] WU Application for Review of Action Taken Pursuant to Delegated Authority at p. 11.

nications Commission eventually to require the merged domestic carrier to restrict itself solely to 'domestic' telegraph operations if found to be in the public interest. . . ."[7] WU argues that this recommendation was embodied in the divestment requirement and leaves the Commission the power to authorize those international operations it finds to be in the public interest. RCA disputes this view, however, and argues, along with WUI, that the mandatory language appearing in the present divestment clause does not give the Commission any discretion in this regard. We believe that both WU on the one hand, and RCA and WUI on the other, have misread the legislative history.

4. The divestment clause in the present Section 222 cannot be read in isolation. It is the result of many years of Congressional and Commission inquiry into the problems of the telegraph industry and possible solutions for those problems. The question had been studied repeatedly and the consensus was that a merger of Postal and WU, and a separate merger of the international carriers, was the most practicable solution to the problems of the industry.[8] The Commission had prepared two reports—one in 1935[9] and a later one issued in two parts (1) on the domestic telegraph industry (1939) and (2) on the international industry (1940) (collectively, the 1939 report).[10]

[7] S. Rept. No. 769 at p. 25. The quoted language resulted from changes made by the full committee before submission of the report to the Senate. The orginal draft had provided the Commission be empowered "eventually to *permit* the merged domestic carrier to restrict itself to 'domestic' telegraph operations. . . ." (Emphasis added).

[8] *See, e.g.,* Hearings on S. Res. 95, 76th Cong., 1st Sess. (Part 1), (1941) (1941 Hearings) 5.

[9] The text of this report may be found in the Hearings on S. Res. 95, 76th Cong., 1st Session, at pp. 13—21 (1939 Hearings).

[10] The 1939 (domestic) report is printed in the 1941 hearings (Part 2) at pp. 394—450. The 1940 (international) report is printed at pp. 451—481.

In both of these reports the Commission recommended merger legislation. The 1935 report included a recommended draft bill to permit the merger, but that bill contained no provision dealing with divestment of the WU international operations. *See* 1939 Hearings at pp. 14—15. Congress took no action on the proposal until 1939 when it instituted its own study of the industry and directed the Commission to submit a new report (1939 Report). The Commission recommended legislation which would (1) permit WU and Postal to merge, (2) permit the merged carrier to acquire AT&T's TWX and telegraph leased channel services, (3) discontinue the domestic telegraph operations of Mackay Radio Telegraph Co. (now ITT Worldcom) and RCA (which the merged domestic carrier would be permitted to acquire); and (4) permit merger of the international carriers.[11] As is apparent from this proposal, the Commission was recommending a total restructuring of the United States communications industry into a domestic telegraph entity, a separate international telegraph entity and one telephone entity operating in both the international, and domestic spheres. It is interesting to note that neither in the 1939 Report, nor in the amplifying testimony of Commissioners Fly and Craven[12] was there any explicit discussion of whether WU's then operation in both the international and domestic spheres would represent a problem if the

[11] There was also a "minority view" which differed from the majority proposal in that under the recommendation there should be separate mergers of radio telegraph and wire telegraph carriers, rather than one entity comprising both modes of transmission. Also, the minority saw no need for the merged landline carrier to acquire the AT&T leased channel service. *See* 1941 hearings (Part 1) at pp. 219—23.

[12] Commissioner Lawrence Fly testified for the majority and Commissioner Craven for the minority in the hearings held in connection with the 1939 Senate study. *See* 1941 Hearings (Part 1) at pp. 4—27 (Fly) and pp. 218 *et seq.* (Craven).

restructuring proposal was to be implemented; nor was there any discussion of a divestment requirement.[13] The Senate's Report on its 1939 study (S. Rept. No. 769) did, however, make specific recommendations to deal with WU's dual domestic and international operations.[14] This is the language quoted by WU that the Commission be given discretionary power to restrict WU to domestic operations after the merger. From the legislative history two important themes are evident and should be emphasized. First, it is clear that in proposing merger legislation Congress was intending a total restructuring of the industry along the lines of the Commission's recommenda-

[13] Apparently, the Commission looked at the question only in terms of concurrent international and domestic mergers. Presumably, if there were a separate international merger, WU's Cables Division would be merged along with the other IRC's. Absent that merger, there appears to have been no consideration of a divestment requirement applicable solely to WU.

[14] S. Rept. No. 769 at p. 25 provided that: 1. [T]he Congress [should] approve an amendment to the Communications Act of 1934, permitting—

(a) Domestic American telegraph carriers to merge; and

(b) International American telegraph carriers to merge; but with

(c) A proviso that there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity; and

(d) The legislation should define "domestic" and "international" carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged skill/domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest; and

(e) There should be no requirement that the domestic or international mergers be carried out simultaneously or at all.

* * * * * * *

tions and the legislation was to effect that purpose. However, no requirement for a single international entity was ultimately enacted. Second, with respect to WU's international operations, it is clear that the senators were concerned that WU would get from the merger a domestic telegraph monopoly which would allow it unfairly to favor its own Cables Division. It was this potential for abuse that prompted inclusion of the provision empowering the Commission to restrict WU to the domestic sphere. As we read the legislative history, this was the dominant purpose underlying the statute and it is this purpose which we must bear in mind in interpreting the divestment clause.

5. The Committee's recommendations were implemented in a draft bill S. 2445 which was introduced in 1941. That bill contained a divestment requirement (in the event of merger) substantially identical to the version finally enacted:

> Any proposed consolidation and merger of domestic telegraph carriers shall provide for the divestment by [WU] of the international telegraph operations theretofore carried on [by it]. . . .

The bill did not, as the present Section 222 does, define any of the terms used in it. We therefore have no indication of the meaning intended by the phrase "international telegraph operations theretofore carried on." We do have the statement of the bill's drafter, Senator McFarland, that it was intended "to reflect what is contained in Senate Rept. No. 769. . ."[15] After hearings, the Committee reported a substitute bill S. 2598 which also contained a divestment requirement, the operative

[15] Hearings on S. 2445, at pp. 6—7. Senator White, who helped McFarland draft the bill, agreed to McFarland's characterization. *Id.* at p. 7.

words of which were also "international telegraph operations theretofore carried on." *See* S. Rept. No. 1490 at p. 1. The only discussion of the bill in S. Rept. No. 1490 is that the bill "provides for the divestment by the merged or consolidated domestic telegraph carrier of any international telegraph business it may carry on"[16] and therefore sheds little light on the meaning to be given the phrase. The substitute bill limited the merger authorization to domestic telegraph carriers because of the objections of the defense agencies that the disruption attendant upon an international merger would endanger the war effort.[17] There is no discussion in the Committee report of the impact upon the overall restructuring of the industry from deletion of the international merger provisions. Also, there was no discussion of its impact upon the provisions remaining in the bill. Rather, the provisions were simply deleted. S. 2598 passed the Senate and was sent to the House. The House Interstate and Foreign Commerce Committee reported, after hearings, a substitute bill[18] which, *inter alia,* restored the international merger provisions and included a requirement that the merged international carrier divest itself of any domestic telegraph operations.[19] The bill failed in the House for lack of a quorum and died when the Congress came to an end.

[16] *Id.* at p. 9.

[17] *Id.* at p. 8.

[18] *See* H. Rept. No. 2664 at p. 2.

[19] Before World War II, Mackay and RCA engaged in domestic radio telegraph operations. During the war, however, those operations were halted by the War Communications Board on the grounds that radio transmission presented too many problems of security and that the frequencies used were needed for the defense agencies. After the war, those operations were not started again.

6. In the succeeding Congress, the matter came before the Senate again in S. 158. That bill was identical in all relevant respects to bill S. 2598 as passed by the Senate the year before. In reporting this bill to the Senate, the Committee, in S. Rept. No. 13, incorporated by reference the comments and analysis made in S. Rept. No. 1490 relating to S. 2598. S. Rept. No. 13 at p. 1. The bill passed the Senate and was sent to the House. In the House, the divestment clause was removed due to problems which the House believed would render such divestment impossible.[20] After passage in the House, the House and Senate versions were referred to a conference committee to work out the differences between them. The conference committee version of the bill, which is the present Section 222, did not provide for an international merger and restored the WU divestment requirement.[21]

7. As was the case with its predecessors, the Conference Committee report sheds no light on the meaning to be given the phrase "international telegraph operations theretofore carried on" and we must therefore assume that the phrase was intended to have the same meaning as it did in earlier versions of the language. Our only clue to the meaning of the phrase is the statement in S. Rept. No. 1490 (reporting S. 2598) that the divestment clause "provides for the divestment by the merged or consoli-

[20] The House report on this bill (H. Rept. No. 69) does not state the reason the provision was deleted, but we can assume that the remarks in H. Rept. No. 2664 (reporting S. 2598) are applicable to this matter. In H. Rept. No. 2664, the House Committee stated that the provision was deleted since it was felt the existence of the Anglo leases would prevent divestment. In 1943, WU held five 99 year leases for transatlantic submarine cables from the Anglo-American Cable Co., Ltd. Provisions in the leases forbade assignment of the leases to anyone other than an assignee who also was assigned WU's domestic landline system.

[21] *See* H. Rept. No. 142.

dated domestic telegraph carrier of any international telegraph business it may carry on." S. Rept. No. 1490 at p. 9. From this language it appears to us that the phrase in the divestment clause is no more than a descriptive phrase defining the operations which WU was to be required to divest in return for merger with Postal. In this we agree both with WU and with WUI. However, we disagree with both parties as to the significance of this language with respect to future WU international operations.

8. Neither in the statutory language nor in the legislative history is it clear that WU is forever barred from all types of international operations or that, once divested of prior operations, WU was thereafter free to re-enter the same operations. Congress simply appears never to have addressed the question. This is not surprising considering the circumstances with which Congress was then dealing. The telegraph industry had been relatively static for many years; except for the persistent decline in revenues. Congress could not expect that teletypewriter exchange service (Telex and TWX) or leased channel services, which accounted for very minor portions of telegraph company revenues in the 1930's, would in later years become the dominant services and that the revenues therefrom would grow at such a tremendous rate. Rather, Congress was dealing with the industry in its contemporary pattern. While Congress provided a comprehensive scheme covering the narrow situation before it, it gave no indication of an intent to legislate for future situations involving different technology and service patterns or to supersede other pertinent sections of the Act. In the absence of any provisions or discussion dealing with the situation presented by WU's Hawaii Mailgram proposal, we must construe the provisions of Section 222 in the light of the scheme of

the Act as a whole, where Congress did set forth broad guidelines and gave us ample authority and discretion to deal with evolving circumstances.

9. To recapitulate, while we do not find the legislative history to be of much help in construing the language of the statute—"international telegraph operations theretofore carried on"—it does appear that the fundamental purpose of the divestment requirement was to protect against abuses which could follow upon the merger as a result of WU's position as the sole domestic pick-up and delivery agent for PMS traffic in the United States. Congress feared that WU would be able to use its domestic monopoly position unfairly to favor its international Cables Division in competing with international carriers in providing PMS service (which constituted virtually their entire business). Since the international carriers in 1943 operated only in the gateway cities, they were dependent on WU for the bulk of the domestic pick up and delivery of their PMS traffic. Thus, WU was in a position virtually to drive an international carrier or carriers out of business were it so inclined. It was in this context that Congress required WU to divest itself of its international operations and enacted the formula provisions. We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS operations in competition with the IRC's. However, we are not dealing here with a proposal for WU to provide PMS to Hawaii. After considering the policy of the divestment requirement, we conclude that the divestment clause required WU to divest itself of the international operations it was engaged in at the time of the merger, primarily PMS, and does not deprive this Commission of discretion to authorize WU to provide overseas points with new services that were not within the contemplation of Congress in 1943.

10. Nor are prior decisions of this Commission relied upon by RCA and WUI contrary to the view announced herein. Both WUI and RCA urge that our decision in *Western Union Telegraph Co.* (Divestment II), 25 F.C.C. 35 (1958), *order set aside and remanded sub nom, Western Union Telegraph Co. v. United States,* 267 F. 2d 715 (D.C. Cir. 1959), requires WU forever to be limited to domestic operations. We do not agree with this conclusion. The divestment order in question was issued as the decision in Docket No. 10151. Pursuant to the divestment requirement in Section 222(c) (2), the Commission's order approving the domestic telegraph merger, *Application for Merger of Western Union and Postal Telegraph,* 10 F.C.C. 148 (1943) (Docket No. 6517), we ordered WU to divest itself of its operations within one year. *Id.* at 154. We recognized the difficulties represented by the Anglo lease and World War II and provided that WU could request extension of that time so long as it exercised the required due diligence in effecting divestment. Extensions of time were granted until 1952, when we instituted an inquiry (Docket No. 10151) to determine the nature and extent of WU's efforts to divest itself of the international operations, any impediments that existed thereto, and whether the Commission could or should prescribe a plan of divestment (or should modify the requirement in some way). *Western Union Telegraph Co.* (Divestment I), Order released March 6, 1952, quoted in 25 F.C.C. 35 at pp. 35-39. After hearings, we concluded that WU had not exercised due diligence in effecting divestment, 25 F.C.C., at 84, and directed it to file a plan

of divestment within six months of the release of the order, *Id.* at p. 90.[22] The factual situation in which that case arose was that eight years after the merger and our divestment order, WU was still operating its international facilities without appearing to have made diligent efforts to comply with our order. Therefore, our basic concern was the discharge of our statutory duty to enforce the divestment requirement and whether WU could comply in view of its legal obligations. As we noted, Congress drafted the divestment requirement with full awareness of the Anglo lease and had concluded that it did not present an insurmountable obstacle. In ordering divestment, we concluded, therefore, only that Congress intended WU to divest itself and that WU was able and required to comply with that requirement. The case does not stand for the proposition that WU could never offer any form of international services—the question simply was not at issue there.

11. By the same token, *Western Union Telegraph Co.* (Divestment III), 30 F.C.C. 323 (1961) (Docket No. 6517), where we approved the divestment plan submitted pursuant to Docket No. 10151, does not hold that there is a permanent bar to any WU international operations. That case involved a proposal that WU acquire 250,000

[22] The Divestment II order was appealed by WU, Western Union Telegraph Co. v. United States, 267 F. 2d 715 (D.C. Cir.) (1959). The court upheld the Commission's power to require WU to file a plan of divestment, but set aside our order and remanded the matter to the Commission because it felt we had exceeded our authority in requiring a plan by a date certain without regard to whether "due diligence" could secure such a plan. The Commission could, said the Court, require WU to file a plan after due diligence had produced a viable one, or we could direct it to submit conditional plans by a date certain subject to agreement of lessor to an assignment of the leases without the landline system.

shares of Class B stock in Western Union International, Inc. (the corporate name under which the American Securities Corp. would purchase and operate WU's international operations). We held that WU could not hold this stock consistent with the divestment requirement in Section 222(c) (2), even though WU would not thereby have any influence on the new company since the Class B stock had no voting rights. Our decision turned not only on the requirement that WU divest itself of the operations it carried on in 1943, but also on the prohibition in Section 222(b) (1) on WU acquisition of any interest in an international telegraph carrier.[23] As the stock plan would clearly result in WU's retention of a direct financial, if not a management, interest in its former international operations (thus not achieving the complete divestment called for by the statute) and would also amount to acquisition of an interest in an international telegraph carrier (in violation of the explicit language of Section 222(b) (1)), the plan ran afoul of Congressional intent. In the present case, neither of these problems exist. WU proposes to provide Hawaii Mailgram without participation of any IRC and does not propose to use any ficilities of which it divested itself. Thus, there is neither a retention of WU's prior interest in international operations nor acquisition of an interest in an international telegraph carrier.[24]

12. It bears noting that one of the objections to the stock plan was that it would complicate unduly, or

[23] *See* 30 F.C.C. at 340-1.

[24] We note the stock plan in question in the Divestment III case provided that, as a separate transaction. WU could purchase the stock for $100,000. For this reason, the stock was not part of the consideration for its Cables Division but represented a separate acquisition of stock.

possibly frustrate, the potential merger of the international telegraph carriers, authorization of which was then being considered in Congress with the active support of the Commission. We stated that the mandatory redemption feature of the Class B stock[25] would create severe problems in the event of an international merger, no matter who held the stock, and could therefore frustrate the merger and the public interest benefits to be derived therefrom. As we have seen from the legislative history, the international merger was an integral part of what Congress hoped ultimately to achieve through Section 222. In view of all these considerations, the decision not to permit WU to own stock in WUI is based on reasons not applicable to the instant situation and that decision does not stand as a bar to consideration of WU's application.

13. WUI also relies on our decision in *Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960) (Docket No. 13188), to support its contention that WU is limited to domestic operations. After Hawaii's admission as a State, WU indicated that it desired for the first time to offer its traditional telegraph services between Hawaii and the United States Mainland. WU indicated that it desired to do so only as part of its domestic telegraph operations and contended that Hawaii's admission as a State, had made it a domestic point. By Order released September 9, 1959, F.C.C. 59-916, we instituted an inquiry to determine what changes we should recommend Congress to make in the Act to deal with WU's proposal. The problem under

[25] The agreement stated that at any time in the event of dissolution, voluntary or otherwise, of WUI, Class B stockholders were to receive $10.00 per share from the assets of WUI available for distribution to stockholders, and only after this had been paid in full could other stockholders share in any remaining assets. The Class B stock was also subject to a redemption feature under which WUI could redeem the stock at any time for $10 per share. *See* 30 F.C.C. at 339.

consideration arose from the following facts: As enacted, Section 222(a) (6) defined "international telegraph operations" as those between any point in the world and "the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland." The term "continental United States" was defined (Section 222(a) (10)) as "the several States and the District of Columbia." In 1943, Hawaii (as a territory) was not part of the "continental United States" and communications between Hawaii and mainland fell within "international telegraph operations." In view of these definitions, Hawaii's admission as a State would appear automatically to have changed Hawaii to a domestic point since it would now be within the definition of "continental United States." We were not convinced Congress had intended such an automatic change in the existing pattern of service and concluded that, if such a change were to be made, it should come about only after consideration of the impact on the public interest. Although WU characterized its proposal as expansion of its domestic telegraph operations, we regarded it as actually involving international telegraph operations.[26] We concluded that, as used in Section 222, the distinction between international and domestic service points was drawn on geographical rather than political lines, and that Hawaii's change in political status was irrelevant for purposes of its status under the divestment clause.[27]

[26] Indeed, WU had stated that it was uninterested in the proposed expansion if it would be considered part of its international operations which it was then under an order to divest at the earliest possible date.

[27] We noted in that case that even when Hawaii was a territory, communications between it and the mainland were "interstate communications" under Section 3 of the Act for purposes of the Commission's jurisdiction. We concluded that the inconsistency between that designation and its treatment under Section 222 was significant and indicated an intention to base its classification on other than political considerations. *See,* 28 F.C.C. at 605.

14. Thus, if WU were authorized to serve Hawaii with its traditional services, that service would be included in its international operations and would be subject to our divestment order. Also, the *Hawaii Service* case stated that we would not recommend to Congress a change in the Act to permit Hawaii to be treated as a domestic point. 28 F.C.C. at 616. Further, we determined to recommend changes which would make clear that Hawaii should not be treated as a domestic point for purposes of Section 222. In 1960, Congress adopted our recommendation and amended the Act specifically to exclude Hawaii as within the continental United States.[28] We reached our conclusion by looking to the policy which the distinction between international and domestic operations was to serve. In connection with that policy we stated that

> [WU] carried on . . . oversea service [N.B., to points other than Hawaii, since WU did not serve Hawaii prior to the adoption of Section 222] in competition with a number of other telegraph carriers which were primarily engaged in such oversea service. Since these latter carriers had only limited facilities for the collection of traffic from, and delivery of traffic to, the public on the U.S. Mainland, they were dependent on and had contractural arrangements with either Western Union or Postal Telegraph for the collection and delivery of their traffic at places they did not serve.

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[28] On December 22, 1959 we had recommended that Section 222(a)(10) be changed to define continental United States as "The District of Columbia and the States of the Union except Hawaii." In the Hawaii Service case, we "reiterate[d] the aforementioned recommendation." 28 F.C.C., at 616 by Public Law 86-264, 74 Stat. 411. *See*, 47 U.S.C. §222(a)(10) (1971).

12. . . . Congress was concerned, among other things, that after such merger . . . [WU] would be able to favor either its own cable system or a particular oversea carrier, to the detriment of others with respect to pickup and delivery at mainland points not served by the limited facilities of such carriers.

13. To prevent this, Congress determined that Western Union should divest itself of its oversea telegraph operations (that is, in which it competed with these carriers), and further determined that Western Union should distribute equitably among these oversea carriers such traffic as was filed with it for delivery at points they served outside the U.S. mainland.

15. In response to WU's argument that Hawaii's status had changed, we observed further that "as a consideration to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier must withdraw from competition with the international telegraph carriers to oversea points, whether they be foreign points or interstate points under Section 3." 28 F.C.C., at 604. From this language, it is apparent that we were concerned in the *Hawaii Service* case, as we are herein and as Congress was in enacting the divestment requirement, with the potential for abuse which WU's postion both as the sole pick up and delivery agent for the IRC's and as one of their competitors. It is for this reason that we rejected WU's proposal to serve Hawaii with PMS and other similar services and recommended changes to the Act which would preclude WU from offering competitive services to Hawaii. That holding, however, was limited to the particular services involved in WU's proposal which were being provided by the IRC's. Thus, we do not find our holding there inconsistent with our present interpretation.

16. We are concerned here, however, with a new service which is not currently offered by any carrier between the mainland and Hawaii. We have competing applications in which all applicants, including WU, are equally situated; where the public interest may be measured without regard to benefits or detriments attendant upon the 1943 merger. Therefore, the concerns we expressed in the *Hawaii Service* case, *supra.*, do not speak to the present facts. It is not our function to shield the IRC's from competition. Our concern in this regard is to assure that all carriers act fairly toward the public and one another. This we can do within the broad powers given us by Congress to regulate in the public interest. We see no need in this matter to pronounce sweeping prohibitions on the activities of a carrier which are not mandated by the statute and which may be detrimental to the public interest.

17. In conclusion we point again to the precedents we consider most relevant to the present situation. Thus, in our domestic satellite authorizations we expressly held that Section 222 applies only to record services of the type offered by WU in 1943, principally PMS. *American Satellite Corporation,* 43 FCC 2d 348, 353 (1973), *RCA Global Communications, Inc.* 42 FCC 2d 774, 780 (1973). Moreover, in our *Second Report and Order* in Docket No. 16495, 35 F.C.C. 2d 844 (1972), which promulgated the policies governing domestic satellite operations, we determined that the rates and services between Hawaii and the mainland should be integrated into domestic rate patterns, 35 F.C.C. 2d at 857-858. We stated that in the event that the record carriers did not achieve satisfactory compliance with this requirement, we would consider authorizing the provision of these services by another carrier such as AT&T or GTE Satellite Corporation. Section 222 has no

applicability to any domestic carrier other than WU and does not preclude competition to the IRC's in the provision of Hawaii/Mainland service. This fact is significant in considering the impact of the divestment clause. Had Congress intended to divide the telegraph industry into domestic and international spheres and to preclude a carrier from operating in both spheres, it would have done so by a provision more tailored to achieve that goal than the divestment clause. The fact that Section 222(c)(2) does not provide for the advent of new carriers, but deals only with the then international operations of one carrier suggests that this was not Congress' intent. As we have said, Congress in enacting Section 222 was facing a specific situation and dealing with particular entities. The statute it enacted attempted to deal with only that situation. Congress did not attempt thereby to anticipate changing circumstances and the advent of new communications services; and it did not attempt to preclude the provision of such services by any carrier.

CONCURRING STATEMENT OF COMMISSIONER CHARLOTTE T. REID

(Re Western Union's application to extend mailgram service to Hawaii)

The citizens of Hawaii are clearly entitled to Mailgram service and I fully agree with my colleagues that this obviously attractive service should be forthcoming.

But, in my opinion, the plain language of Section 222 of the Act raises questions about the legality of Western Union providing such service to Hawaii. Hawaii, by the terms of Section 222(a) (6) and (10), is excluded from the definition of domestic points. It also bothers me that Congress saw fit to amend Section 222(a)(10) to specific-

ally except Hawaii from the definition of "continental United States" in 1960[1] (subsequent to the time Hawaii became a State).

I realize that, as it pertains to Hawaii, the distinction between domestic and international services has become somewhat blurred. This is illustrated by our "domsat" decision as well as our decision allowing AT&T to provide alternate voice-data service to Hawaii. Nevertheless, I would have opted for the more conservative route of removing any legal impendiment to our action by amendment of Section 222 prior to acceptance of Western Union's application. I note that the Commission intends to ask Congress to make this adjustment in the very near future.

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[1] Pub. L. No. 86-624, approved July 12, 1960.

APPENDIX E

Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151

§ 1. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

* * *

Section 2(a) of the Communications Act of 1934, as amended, 47 U.S.C. §152(a)

§ 2. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States

in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but is shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

* * *

Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214

§214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall

first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise

only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this Section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in iterest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint, or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

* * *

Section 222 (a), (b) and (c) of the Communications Act of 1934, as amended, 47 U.S.C. §222 (a), (b) and (c)

§222. Consolidations and mergers of telegraph carriers Definitions

(a) As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States,

Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided,* That nothing in this section shall prevent international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications,

or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

(7) The terms "domestic telegraph properties" and "domestic telegraph facilities" mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

(8) The term "employee" or "employees" (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to reemploy any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consolidation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

(9) The term "representative" includes any individual or labor organization.

(10) The term "continental United States" means the District of Columbia and the States of the Union, except Hawaii.

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic

telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making

consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed consolidation or merger is in the public interest, the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-115

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION

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STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Respondents.

BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN OPPOSITION TO THE PETITION

Respondent ITT World Communications Inc. ("ITT Worldcom") submits this brief in opposition to the petition for a writ of *certiorari* filed by the Western Union Telegraph Company (the "Telegraph Company" or "WU").

QUESTION PRESENTED

Whether the Court of Appeals erred when it held that Section 222 of the Communications Act, which permitted the Telegraph Company to acquire its only domestic competitor despite the prohibitions of the antitrust laws, bars the Telegraph Company from engaging in international telegraph operations as "the price paid by the company for the acquisition of a domestic monopoly over telegraph service." (App. A-14)[1]

1. References in the form "App." followed by a capital letter and number are to pages of the appropriate Appendix to the Telegraph Company's Petition. The quotation is from the Court of Appeals' decision, *Western Union International, Inc.* v. *F.C.C.*, 544 F.2d 87, 93 (2nd Cir. 1976).

STATEMENT

The statute at issue in this proceeding, Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. § 222, is a special exemption from the antitrust laws which was enacted for the Telegraph Company's benefit in 1943. (App. A-8) An understanding of its purpose requires a brief discussion of its background.

A. Background.

As the Court of Appeals recognized, Section 222 had its origin in the economic difficulties facing the American telegraph industry during the depression of the 1930's. (App. A-7) One of the two large domestic carriers, Postal Telegraph Company ("Postal"), was "on the verge of financial collapse," (App. A-7), and the Telegraph Company was also experiencing economic difficulties. (App. D-18) A congressional study concluded that the financial health of the telegraph industry would be improved if Postal were merged with the Telegraph Company. (App. A-8, D-18) However, such a merger would have been of dubious legality under the antitrust laws, since it would give the Telegraph Company a "virtual monopoly" over domestic telegraph service. (App. D-18, D-19) Congress therefore enacted Section 222 to exempt the proposed merger, upon approval by the Federal Communications Commission ("FCC"), from the operation of the antitrust laws.[2]

At the time Congress enacted Section 222, the Telegraph Company was providing both domestic and international telegraph services. (App. A-8, D-19) The proposed

2. Section 222(b)(1) provides:
"It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger . . . ."

merger therefore posed a severe competitive threat to the independent international telegraph companies ("IRCs").[3] (App. A-8, D-28) These carriers transmitted telegraph messages between the United States and various overseas locations, but they did not maintain extensive telegraph networks within the United States. (App. D-28) They were thus dependent on Postal and the Telegraph Company to originate and deliver international telegrams in the "hinterland" beyond the small number of "gateway" cities in which they operated domestically. (App. D-28) The absorption of Postal by the Telegraph Company would therefore leave the IRCs totally dependent on the Telegraph Company, one of their competitors in the international area, for domestic services which were essential to their continued operation and success. (App. A-8, D-28)

To protect the IRCs from the anticompetitive effects of the proposed merger, Congress provided, in Section 222(c)(2), that if the Telegraph Company chose to acquire Postal, it would be required to divest itself of its international telegraph operations:

> "Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger . . . ."

It is the effect of Congress' divestiture clause which is at issue here.

Subsequent to the enactment of Section 222, the Telegraph Company consummated its merger with Postal. Divestiture of the Telegraph Company's international operations was accomplished in 1963, when the Telegraph Company transferred those operations to an independent,

3. The international carriers are, in the parlance of the trade, referred to as "international record carriers" or "IRCs".

newly-formed company, respondent Western Union International, Inc. ("WUI").[4] This divestiture completed the structure of the telegraph industry which Congress envisioned when it enacted Section 222. The Telegraph Company, the only domestic telegraph carrier, was confined to domestic activities, and the international market was served by a number of competing IRCs, including ITT Worldcom and WUI.[5] (App. A-4)

B. Proceedings Before the FCC.

The instant controversy commenced on April 4, 1972, when the Telegraph Company filed an application, pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, for authority to offer an international telegraph service known as "Mailgram"[6] between the United States mainland and Hawaii:[7] (App. D-2, n.1)

The FCC's Common Carrier Bureau rejected the Telegraph Company's application on the grounds that Section 222 prohibited the Telegraph Company from resuming international operations. However, the full Commission reversed that decision, and directed the Common Carrier Bureau to accept the Telegraph Company's application for filing, to be considered along with the competing applica-

4. (App. D-18) The events leading up to the divestiture, which the Telegraph Co. delayed for twenty years after its merger with Postal, are described in *Western Union Telegraph Co.* v. *United States*, 267 F.2d 715 (2nd Cir. 1959).

5. The other major IRCs are RCA Global Communications, Inc. and TRT Telecommunications Corp. There are also several smaller international carriers competing in the market.

6. The principal difference between Mailgram and traditional telegraph services is that Mailgrams are delivered to the recipient by the postman rather than a Telegraph Company messenger. (App. A-3-A-4)

7. Although Hawaii is, of course, a state, telegraph service between Hawaii and the mainland is categorized by Section 222(a)(10) as international telegraph service. (App. A-5)

tions for authority to provide Mailgram-type services to Hawaii which had been filed by the IRCs and other carriers.[8]

In its decision, the FCC recognized that if the Telegraph Company's application were granted, the Telegraph Company would be permitted to engage in international telegraph service for the first time since the divestiture of its international operations in 1963. (App. D-7-D-8) The Commission also recognized that the divesture clause of Section 222 must be read as a continuing bar to the Telegraph Company's resumption of its divested international operations:

> "We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS[9] operations in competition with the IRCs." (App. D-28)

Nevertheless, in what the Court of Appeals subsequently characterized as an "unjustified" and "strained" reading of the statute, (App. A-13), the Commission found that Section 222(c)(2)—by describing the international telegraph operations to be divested as those operations "theretofore" carried on by either Postal or the Telegraph Company—distinguished sharply between "old" telegraph services which were in existence when Section 222 was enacted in 1943, and "new" telegraph services, such as Mailgram, which had been developed in the intervening years. Although the Telegraph Company was barred by Section 222(c)(2) from

8. The FCC's decision is reproduced as Appendix D to the Petition.

9. The FCC's abbreviation stands for "public message service," the industry's term for traditional telegraph service.

offering "old" services internationally, the Commission held that it had jurisdiction to consider the Telegraph Company's application to provide "new" services. (App. D-11) In drawing this distinction, the FCC made no effort to explain what rational purpose Congress might have had for distinguishing between "old" and "new" international services, when the Telegraph Company would have the same opportunity to exploit its domestic monopoly and compete unfairly with the IRCs regardless of whether the international telegraph service in question were "old" or "new". Nor did the Commission attempt to explain why Congress included a definition of "international telegraph operations" in Section 222 which was broad enough to encompass both "old" and "new" services, if Congress had indeed intended to limit the scope of Section 222 to services in existence in 1943.[10]

C. The Court of Appeals Decision.

On appeal, the Court of Appeals for the Second Circuit reversed the FCC and held that Section 222(c)(2) bars the Telegraph Company from engaging in international telegraph operations unless and until Congress determines that the divestiture clause should be modified.

In reaching its decision, the Court of Appeals first considered the FCC's argument that Section 222(c)(2), like the rest of the Communications Act, should be construed as "setting down only 'broad legislative goals' and allowing the FCC broad and flexible power to achieve those goals 'in the light of changing circumstances'." (App. A-6) While the court did not deny that, as a general rule, the Communications Act left the FCC a great deal of flexibility and discretion to regulate matters within its jurisdiction, it refused to

10. Section 222(a)(6) provides:
"The term 'international telegraph operations' includes acceptance, transmission, reception and delivery of record communications by wire or radio. . . ."

hold that the detailed Congressional plan for the merger of Postal and the Telegraph Company was intended as nothing more than a non-binding statement of legislative goals which left the FCC free to follow any course it chose. (App. A-9) The court pointed out that the Congressional study which preceded Congress' consideration of Section 222 had recommended that the FCC should be permitted to decide whether the international operations of the Telegraph Company should be restricted after the merger, if the Commission found such a restriction to be in the public interest. (App. A-7-A-9) However, that recommendation was ultimately rejected by Congress, and Section 222 expressly required the FCC to bring about divestiture of the merged company's international operations, leaving the FCC only the discretion to fix a reasonable time in which divestiture would be accomplished. (App. A-9) The court concluded, in view of this legislative history, that Congress had chosen to decide the future of the Telegraph Company's international operations itself, rather than delegating that decision to the FCC:

> "In short, the evolving language of the statute itself militates against a reading of § 222(c)(2), as the FCC read it, to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC 'broad and flexible powers to achieve those goals in the light of changing circumstances.' Instead, in enacting this governing statute, Congress granted the FCC only the power to fix, in its discretion, the time within which the divestiture of international operations by domestic merged entities was to be accomplished. Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power." 544 F.2d at 90-91. (App. A-9)

Having rejected the FCC's argument that Section 222 did no more than establish "broad legislative goals," the Court of Appeals turned to the more narrow ground on which the FCC rested its original decision; namely, that Section 222 was applicable only to "old" telegraph service and did not prevent the FCC from authorizing the Telegraph Company to offer "new" services not in existence when Section 222 was enacted in 1943. (App. A-11) The court concluded "that there is no basis whatever in the legislative history to support so limited and strained a construction of the statute." (App. A-11)

The Court of Appeals reviewed a number of statements from the legislative history of Section 222 which indicated that Congress' concern was not limited to the particular types of telecommunication services which existed in 1943, but rather that Congress intended to address the more basic question of how the telegraph industry should be structured to minimize the adverse effects which could result from the Telegraph Company's monopolization of domestic telegraph service. (App. A-11-A-12) In this context, the Court of Appeals held that it must reject the FCC's argument (which had no support in the legislative history) that the phrase "theretofore carried on" was intended by Congress to remove "new" telegraph services from the scope of Section 222. (App. A-13) As the court pointed out, the FCC's construction of Section 222 would seriously undermine the protection which Congress had intended to provide the IRCs from abuses of the Telegraph Company's monopoly, since the Telegraph Company would, under the FCC's theory, be free to re-enter international competition by the simple expedient of introducing "new" telegraph services slightly different from the types of service available in 1943:

> "The FCC's heavy reliance on the 'theretofore' language of § 222(c)(2), *supra*, is, therefore, unjustified.

> The word 'theretofore' must be placed in its proper context by looking at the legislative history as a whole, *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972), which does not reveal an intent by Congress to use the word as a line of demarcation for the types of international record services which WU could or could not engage in after the merger with Postal Telegraph. To hold otherwise would not only give the word 'theretofore' a strained meaning, but would imply that WU could defeat the import of the congressional scheme of § 222 by re-entering international operations shortly after its mandated divestiture by developing or acquiring interests in modes of record communications, other than standard telegraph service, not engaged in by the company in 1943." 544 F.2d at 92. (App. A-13)

Having concluded that Section 222 denied the FCC authority to consider the Telegraph Company's application to provide what was concededly an international telegraph service, the Court of Appeals reversed the FCC. Judge Mansfield dissented.[11]

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11. Judge Mansfield's dissent was based primarily on his conception of the so-called "plain meaning" rule of statutory construction, which is out-of-step with the views expressed by this Court, *see, e.g. Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962) and his colleagues on the Second Circuit, *see, United States* v. *Reid*, 517 F.2d 953, 967 (2nd Cir. 1975). Judge Mansfield concluded that Section 222 did not prevent the Telegraph Company from resuming its international operations after divestiture had been completed. However, it is unreasonable to assume that Congress would expressly require the Telegraph Company to divest itself of its international operations, but leave the Telegraph Company free to undo the effects of that divestiture by resuming those same international operations the moment after divestiture was completed. As the FCC itself recognized (in the passage quoted, *supra*, p. 5), Judge Mansfield's construction of the divestiture clause renders the statute "meaningless and absurd", and his reading of Section 222 was properly rejected by the majority of the Second Circuit panel. See p. 16, *infra*.

ARGUMENT

The Court of Appeals' decision does not present an important question of federal law, nor is it in conflict with any of this Court's prior decisions, despite the Telegraph Company's suggestions to the contrary.[12] It is therefore inappropriate for this Court to grant a writ of *certiorari* to review the Court of Appeals' resolution of the issues presented to it.

A. The Petition Does Not Present An Important Question of Federal Law.

As demonstrated by its background and legislative history, Section 222 is a piece of special-interest legislation which was enacted solely for the benefit of the Telegraph Company, and the Telegraph Company, having voluntarily chosen to avail itself of the antitrust exemption offered by the Section, is the only company that is subject to the limitations on international activities which the Section imposes. This Court, in its discretion, should decline to adjudicate the meaning of a statute which is applicable to a single litigant.

The limited scope of Section 222 is illustrated by the fact that the Telegraph Company's Petition marks the first time in the 30-odd year history of Section 222 that this Court has been asked to consider the Section's meaning or significance. Although Section 222 is literally applicable to any merger of "domestic telegraph carriers," the Telegraph Company is, as a practical matter, the only company remaining in that category, and the Court of Appeals' interpretation of Section 222 is therefore unlikely to have any effect on any

12. The Telegraph Company's Petition does not argue that the Second Circuit's decision is in conflict with the holdings of any other circuit. The Second Circuit is, apparently, the only Court of Appeals which has ever considered the meaning of Section 222.

other party in any future litigation. Nor will the resolution of any other case pending in the lower courts be determined or guided in any way by the Court's decision of the instant controversy.[13] Under these circumstances, the Telegraph Company's Petition does not present a question of general public importance which this Court should resolve.

Apparently aware that its own dissatisfaction with the limitations placed upon it by Section 222 is not an adequate ground for invoking this Court's jurisdiction, the Telegraph Company argues that its disqualification as an applicant to provide international telegraph service will somehow impinge on the FCC's ability to perform its statutory functions. However, since the FCC has not seen fit to file its own petition for a writ of *certiorari*,[14] it is at least open to question whether the FCC itself feels that the Court of Appeals' decision represents a significant obstacle to achieving any of its regulatory objectives.[15] Even though the

13. *Compare, United States* v. *Constantine*, 296 U.S. 287. 290 (1935).

14. The FCC has, however, indicated it might support the Telegraph Company's application for a writ.

15. The Telegraph Company's Petition suggests that, as a result of the Court of Appeals' decision, the FCC will be required to reexamine a number of grants of authority to the IRCs. This, however, is not the case. Since Section 222(c)(2) is applicable only to the Telegraph Company, the Court of Appeals' opinion will not, as a matter of law, affect the validity of any certificate of authority awarded to any other carrier.

It should be noted that the FCC decisions which purportedly comprise a policy of permitting the IRCs or their affiliates to compete with the Telegraph Company domestically, *see, RCA Global Communications, Inc.*, 42 F.C.C. 2d 774 (1973); *American Satellite Corp.*, 43 F.C.C. 2d 348 (1973); *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859 (1974), (cited in the Petition at p.11, n.9) only authorized the IRCs or their affiliates to participate in communication satellite ventures or specialized common carrier networks. These decisions do not permit the IRCs to compete with the Telegraph Company to provide domestic telegraph services such as PMS or Mailgram, and the FCC has been careful (in these and other cases) to place restrictions on the IRCs' operating authority which protect the Telegraph Company's domestic position.

Telegraph Company is foreclosed from consideration as a potential carrier of international telegraph services, the FCC will still have the option of authorizing any or all of the IRCs to provide such services. Thus, in the international area, the FCC has the opportunity to choose among a number of potential carriers, a luxury of choice it has not enjoyed with respect to domestic services because the Telegraph Company has no significant domestic competitors.[16] Moreover, should the IRCs ever fail to provide adequate international service at reasonable rates, the FCC has more than adequate powers under the Communications Act to require them to do so.[17] It is therefore difficult to perceive how the FCC will be inhibited in performing its regulatory duties by the Court of Appeals' decision, and the Telegraph Company's Petition fails to explain why the decision will have such an unlikely result.

In refusing to disturb the Court of Appeals' decision, the Court would merely preserve the *status quo* which has existed in the telegraph industry since the Telegraph Company divested itself of its international operations fourteen years ago. Significantly, the FCC did not find in its decision, nor argue before the Court of Appeals, that the international telegraph service provided by the IRCs has been inadequate in any respect during those fourteen years, despite the Telegraph Company's absence from the inter-

16. As noted above, three IRCs and the Hawaiian Telephone Company are seeking Commission authorization to offer Mailgram-type service to Hawaii, the particular type of telegraph service at issue here. (App. D-10-D-11)

17. See, generally, Sections 201-205 and Section 214 of the Communications Act, 47 U.S.C. §§ 201-205, 214. In order to assure that common carriers subject to its regulation are providing adequate service, the FCC has statutory authority to, *inter alia,* prescribe reasonable rates for carriers' services (Section 205), prohibit carriers from discriminating between different persons or different localities in their rates or practices (Section 202), and compel carriers to acquire adequate facilities for the performance of their common carrier services. (Section 214(d)).

national market. Should it ever appear that it might be in the public interest for the Telegraph Company to resume international operations, the Court of Appeals has not raised an insurmountable obstacle to the Telegraph Company's re-entry into the international market, but has merely held that Congress has reserved the decision on that question to itself, rather than delegating it to the FCC.[18]

In short, the instant controversy is nothing more than a dispute among a number of regulated common carriers as to how many of them are eligible under the Communications Act to serve a particular geographical area. The Court of Appeals' delineation of the boundaries which Congress placed on the Telegraph Company's operations is of obvious interest to the carriers involved. However, the telegram-sending public will not be affected by the Court of Appeals' decision, since adequate service will be provided in all events. The Petition therefore does not present a significant issue of public importance which this Court should resolve.

B. The Court of Appeals Decided This Case Correctly and in Full Accord With This Court's Decisions.

The Telegraph Company argues that the Court of Appeals' decision was contrary to this Court's holdings in *United States* v. *Southwestern Cable Company,* 392 U.S. 157 (1968) and *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972). However, Section 222 was not at issue in

18. Indeed, bills to modify or reverse the Court of Appeals decision have already been introduced in Congress by the Telegraph Company's supporters. On August 5, 1977, the Senate approved a bill, S. 1866 (95th Cong., 1st Session), which would permit the Telegraph Company to apply for authority to provide Mailgram and other telegraph services between the Continental United States and Hawaii. The bill would accomplish this result by amending Section 222 to redefine Hawaii as a domestic, rather than an international, point.

either of those cases and, moreover, their reasoning has no application to the facts of the instant case.

In *Southwestern Cable* and *Midwest Video,* the Court considered the FCC's jurisdiction to regulate community antenna television ("CATV"), a form of communications which was not in existence when the Communications Act was enacted in 1934. The Court, however, found that CATV came within the FCC's statutory grant of jurisdiction to regulate "all interstate . . . communication by wire or radio,"[19] and that the Commission's efforts to regulate CATV were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[20] The Court therefore recognized the FCC's authority to regulate CATV broadcasting despite the fact that the Communications Act did not explicitly address the FCC's jurisdiction over CATV.

Unlike *Southwestern Cable* and *Midwest Video,* the present case does not involve the scope of the FCC's general grant of jurisdiction to regulate the telecommunications industry. In contrast to its silence with regard to CATV, Congress has enacted, in Section 222, a comprehensive statutory plan for the merger of Postal and the Telegraph Company. In that Section, Congress chose to decide a number of details concerning the merger which it might otherwise have delegated to the FCC.[21] It is therefore

19. Communications Act, Section 2(a), 47 U.S.C. § 152(a).

20. *Southwestern Cable Co., supra,* 392 U.S. at 178. *Accord, Midwest Video Corp., supra,* 406 U.S. at 664-670.

21. For example, Congress itself provided that the Telegraph Company should divest itself of its international operations, despite suggestions that this question could be left to the FCC. See p. 7, *supra.* Section 222 also provided that the FCC should not approve any plan of merger which resulted in a significant alien ownership of the merged company's stock (Section 222(d)). The FCC was directed to develop a formula for the distribution of outgoing international telegraph traffic which would treat the merged carrier's international division and the IRCs equally (Section 222(e)). Congress also took it upon itself to prevent the merged carrier from discharging any employees with more than 4 years of seniority, and to provide other measures to protect the Telegraph Company's employees from the dislocations resulting from the merger. (Section 222(f)). Obviously, Congress could have left all these details to the FCC, but chose not to do so.

[Footnote continued on next page]

indisputable that Congress has limited the FCC's general jurisdiction to deal with the consequences of the merger between Postal and Telegraph Company, and the only issue presented here is whether one of the matters Congress decided in Section 222 was that the Telegraph Company should be barred from international operations unless Congress acted to relieve it of that bar. *Southwestern Cable* and *Midwest Video* are neither controlling nor illuminating on this narrow question, for neither of these decisions suggests that the FCC's broad general grant of regulatory jurisdiction permits the Commission to ignore a clear statutory limitation on its authority.[22]

The issue presented to the Court of Appeals was thus nothing more than a straightforward question of statutory construction, which it resolved correctly and in accordance with this Court's prior decisions.[23]

[Footnote continued from previous page]

22. *National Ass'n. of Regulatory Utility Commissioners* v. *F.C.C.,* 533 F.2d 601, 617 (D.C. Cir. 1976); *American Telephone & Telegraph Company* v. *F.C.C.,* 487 F.2d 865, 875 (2nd Cir. 1973). *See also, GTE Service Corp.* v. *F.C.C.,* 474 F.2d 724, 733 (2nd Cir. 1973).

23. As the FCC itself stated, the question presented in the instant case is quite limited, and has nothing to do with the scope of the FCC's general grant of statutory authority to regulate the communications industry:

> "[W]e are faced with the narrow legal question whether the [Common Carrier] Bureau correctly interpreted the divestment clause of Section 222(c)(2) as a permanent bar to WU international or overseas telegraph operations." (App. D-6)

In finding that the divestiture clause of Section 222 constituted a continuing barrier to the Telegraph Company's resumption of international telegraph operations, the Court of Appeals properly gave that clause the well understood meaning which is familiar to the antitrust bar.[24] As the FCC had itself recognized, Section 222(c)(2) would be rendered "meaningless and absurd" if it were not interpreted as preventing the Telegraph Company from resuming the international operations it was required to divest. (App. D-28, quoted *supra,* p. 5) Any other decision on this point would not only permit the Telegraph Company to evade the purpose of Section 222, but might also, by analogy, undercut the effectiveness of innumerable divestiture judgments by leaving defendants unrestrained from reacquiring the very assets they were ordered to divest.[25]

The only remaining question before the Court of Appeals was whether Congress, by describing the operations to be divested as those "theretofore carried on" by the merged carrier, intended to exclude "new" telegraph services developed subsequent to 1943 from the ban on the Telegraph Company's international activities. The Court of Appeals resolved this issue in the manner prescribed by this Court. First, the Court of Appeals looked to the "plain meaning" of the statute[26] and found that the interpretation which the FCC urged for the "theretofore" phrase gave the statute a "strained" meaning.[27] (App. A-13) Secondly, the court

24. *See, United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 240 (1975).

25. *See, United States* v. *Paramount Pictures, Inc.,* 165 F.Supp. 643, 645 (S.D.N.Y. 1958), *appeal dismissed,* 358 U.S. 28 (1958).

26. *See, e.g., United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543-44 (1940).

27. *See, Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U.S. 418, 427 (1972). The FCC's interpretation of the "theretofore" phrase of Section 222(c)(2) is not only "strained", but also ungrammatical. If Congress had really meant to refer only to the telegraph services in existence when the statute was enacted in 1943, it would

[Footnote continued on next page]

looked to the legislative history, and found no support for the FCC's interpretation.[28] (App. A-11-A-12) Thirdly, the court examined the purpose which the divestiture clause was intended to accomplish, and concluded that purpose could be defeated by the construction of Section 222 which the FCC was supporting.[29] (App. A-13) Finally, the Court of Appeals noted that the interpretation of Section 222 which the FCC was now urging was inconsistent with both the FCC's and the Telegraph Company's own previous understandings of the statute.[30] (App. A-10) The Court of Appeals' careful statutory analysis meets every standard suggested by this Court and, moreover, clearly reached the the correct result.

[Footnote continued from previous page]

presumably have described them as those operations *"heretofore"* carried on. If the word "theretofore" is given its plain meaning, the requirement that the merged carrier divest itself of international operations "theretofore" carried on must be read as indicating that all operations carried on *at the time of divestiture* must be given up. When Section 222 was enacted, Congress recognized that divestiture of the Telegraph Company's international operations would be delayed by World War II and various other considerations (and, indeed, divestiture was not accomplished until twenty years after the Section was enacted). The insertion of the word "theretofore" in Section 222(c)(2) must have been intended to make absolutely clear Congress' mandate that on the uncertain future date when divestiture finally occurred, *all* of the Telegraph Company's international operations then being "carried on" would be divested, and not just those operations which had been in existence when the statute was enacted or which were carried on when the merger occurred. Thus, far from being a limitation on the divestiture clause, Congress' use of the word "theretofore" underscores the all-inclusive scope of the prohibition on the Telegraph Company's international activities.

28. *See, Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9-10 (1976); *Cass* v. *United States,* 417 U.S. 72, 77-79 (1974); *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972).

29. *See, United States* v. *Bornstein,* 423 U.S. 303, 310 (1976); *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974); *National Woodwork Manufacturers Ass'n.* v. *N.L.R.B.,* 386 U.S. 612, 619 (1967); *United States* v. *American Trucking Ass'ns., Inc., supra,* 310 U.S. at 543.

30. *See, United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858 n. 25 (1975); *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 426.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-115

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS, INC.,
Respondents.

BRIEF OF WESTERN UNION INTERNATIONAL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-115

THE WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS, INC.,

Respondents.

BRIEF OF WESTERN UNION INTERNATIONAL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of respondent Western Union International, Inc. ("WUI") in opposition to the petition of The Western Union Telegraph Company ("WUTelCo") for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered October 20, 1976 (Anderson, Mulligan, and Mansfield, Circuit Judges). That decision held that Section 222 of the Communications Act of 1934 prohibits WUTelCo from offering mailgram telegraph service between the United States mainland and the State of Hawaii.*

* All references to statutory sections are to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

Question Presented for Review

May the Federal Communications Commission ("FCC") create an exception to Section 222, which makes WUTelCo ineligible to engage in international telegraph operations, in order to permit WUTelCo to offer certain limited international telegraph services?

Statutes Involved

Sections 222 and 314 of the Communications Act, as amended, 47 U.S.C. §§ 222, 314, as set forth in Appendix C, *infra*.

Statement of the Case

1. History of Section 222

It had become clear by the late 1930's that economic conditions would not permit the two then operating domestic telegraph companies, WUTelCo and The Postal Telegraph Company ("Postal Telegraph"), to continue to co-exist. Congress, the FCC and the affected domestic and international telegraph companies all agreed that the creation of a single domestic telegraph carrier was the only workable remedy. Section 222 was enacted in 1943 to create an exemption from the applicable antitrust laws, particularly Section 314, that would permit, initially, the merger of WUTelCo and Postal Telegraph and, ultimately, the consolidation of all domestic telegraph operations into one company.*

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* The Congressional and FCC investigations of the telegraph industry that led to the enactment of Section 222 began with an FCC preliminary report to Congress in 1935. *Recommendations of Three Proposed Amendments to the Communications Act of 1934, H.R. Doc. No. 83,* 74th Cong., 1st Sess. (1935). *S. Res. 95,* 76th

(footnote continued on following page)

WUTelCo thus was enabled, free from antitrust limitations, to merge with Postal Telegraph and was given the continuing right to acquire the domestic telegraph operations of other carriers, such as, the teletypewriter exchange service ("TWX") and the domestic private line network of American Telephone and Telegraph Company ("A.T.&T."), and the domestic radio telegraph operations of the international telegraph carriers RCA and Mackay Radio & Telegraph Co. (now a part of ITT). Section 222(b)(1), (2).

Congress, however, recognized that the existence of the several international telegraph carriers ("IRCs") would be threatened by the creation of a unified domestic carrier, because of its power, through its control over the originating and terminating portions of international traffic, to discriminate among the IRCs and to prefer its own international operations over those of other international carriers.* To deal with this problem Section 222

(footnote continued from preceding page)

Cong., 1st Sess. (1939), continued by *S. Res. 268,* 76th Cong., 2d Sess. (1940), authorized the FCC to supplement its 1935 report, resulting in the FCC's 1939-40 *Report on the Telegraph Industry: Hearings on S. Res. 95 Before a Subcomm. of the Senate Committee on Interstate Commerce,* 77th Cong., 1st Sess. 394-481 (1941), and the various subsequent Congressional hearings and reports discussed *infra*.

* Under Section 222(a)(5) the transmission of international messages between points of origin or destination within the United States mainland and points of entry into or exit from the mainland are domestic operations reserved to WUTelCo. As a result WUTelCo, not the IRCs, has all actual contacts with the United States sender or recipient of an international message, except in certain specified "gateway" cities.

Foreseeing the dangers of this situation prior to adoption of Section 222, FCC Chairman James L. Fly and FCC Commissioner Clifford Durr warned that the domestic monopoly would have "the power of life and death" over the IRCs "because much, perhaps most, of the international business originates on the domestic lines." *Hearings on S.2598 Before a Subcommitte of the*

(footnote continued on following page)

further provided, if the domestic telegraph carriers merged, (i) that the resulting monopoly carrier must divest itself of all international operations (Section 222(c)(2)), and (ii) that the domestic company must distribute outgoing international traffic among the IRCs equitably, according to a formula approved by the FCC, Section 222(e)(1).*

Postal Telegraph was merged into WUTelCo promptly following enactment of Section 222. As contemplated and authorized by Section 222(b)(1), WUTelCo also acquired AT&T's TWX system in 1971, thus obtaining a "virtual

(footnote continued from preceding page)

House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess. at pp. 25 and 178 (1942).

Similarly, Commissioner Durr testified that "there is no substantial disagreement anywhere—that the domestic combination should go out of the international business" in order to eliminate "the factor of self-interest which might influence the domestic monopoly to prefer its own international department over its competitors in the international field." *Id.* at 180.

Congress agreed. For example, the 1941 Senate Report stated:

> "In view of the fact that this Company [WUTelCo] also is a major overseas cable operator, under such an eventuality its control over pick-up and delivery facilities within the United States would seriously impair the operation of the competing international carriers." *S. Rep. No. 769,* 77th Cong., 1st Sess. 20 (1941).

Senator Ernest W. McFarland, one of Section 222's sponsors, in introducing the final version of the bill, stated:

> "Paragraph (2) of this subsection [(c)] provided for the divestment by the merged carrier of any international operations which it was carrying on, so that the merged carrier would not be put in a position to compete unfairly with other international carriers by giving preference to its own international lines." *89 Cong. Rec. 1092* (1943).

* Until divestment, WUTelCo's Cables Division, which conducted WUTelco's international telegraph operations, was to be treated as a separate "international telegraph carrier" under the Act. 47 U.S.C. § 222(e)(4).

monopoly" over domestic teletypewriter exchange (telex and TWX) as well as public message telegraph services. *International Record Carriers Communications,* 38 F.C.C. 2d 543, 546 (1972); *Commercial Cable Co.,* 28 F.C.C. 283 (1960).

Slow to heed the absolute command of Section 222, WUTelCo did not divest its international operations until 1963, twenty years after the enactment of Section 222. This delay was

> "due to the laches of [WUTelCo] and its apparent disposition to raise obstacles to compliance with Section 222 and the Commission's orders thereunder . . ." *Western Union Telegraph Co.,* 25 F.C.C. 35 at 86 (1958); *aff'd in part sub nom. Western Union Telegraph Co.* v. *United States,* 267 F.2d 715 (2d Cir. 1959).*

Pursuant to a plan of divestment approved by the FCC, a new entity, WUI, was formed and, in September 1963, it acquired WUTelCo's entire international telegraph business. WUTelCo sought to retain a non-controlling, non-voting stock interest in WUI, but the FCC held that such an arrangement was prohibited by Section 222, which because it embodied "the Congressional desire to divorce

* In that case the FCC, presenting a 13-page catalogue of the competitive abuses of WUTelCo during the 15 years it operated both international and domestic circuits, confirmed the Congressional finding that WUTelCo's abuses could not be checked by FCC regulation. 25 F.C.C. at 58-71 and 78.

> "We think that it is manifest, from our extensive findings in this connection, that continued operation of the cables by Western Union [WUTelCo] gives rise to serious problems in the distribution of international telegraph traffic, and that such problems cannot be alleviated other than by divestment. Thus, the reasons that impelled Congress to require divestment of Western Union's [international] telegraph operations have been amply justified by experience under a combined landline-cable operation." 25 F.C.C. at 78.

completely Western Union's vital landline monopoly, following merger, from all financial interest in international telegraph operations." *Western Union Divestment,* 30 F.C.C. 323, 340 (1961), quoting *Western Union Telegraph Co.* v. *United States, supra,* 267 F.2d 715 at 723 (2d Cir. 1959). As a result, WUI and WUTelCo are separate, entirely independent companies.

2. Prior Proceedings in the FCC

On April 4, 1972, WUTelCo sought to re-enter the field of international telegraph operations for the first time since 1963 by filing an application under Section 214(a) for authority to lease international facilities to provide mailgram telegraph service between the mainland United States and Hawaii, which is defined as an "international" point by Section 222(a)(10). The Common Carrier Bureau of the FCC promptly rejected WUTelCo's application (App. B).

More than three years later, ignoring its own prior decisions and without conducting any hearings at which evidence or argument could be presented, the FCC reversed its own Common Carrier Bureau and ruled that mailgram telegraph service was a "new" service not provided by WUTelCo in 1943, the year of enactment of Section 222, and that, therefore, the otherwise absolute ban of Section 222 on international telegraph operations of WUTelCo was not applicable. (WUTelCo Brief, App. D-28).

In a concurring opinion, Commissioner Charlotte T. Reid, stated that it would have been better to follow the more conservative route of asking Congress to amend Section 222. She noted that the FCC intended to ask Congress to amend the Section.* (WUTelCo Brief, App. D-37).

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* Congress is presently considering such amendatory legislation. *See* Point I, *infra.*

3. Decision of the Court Below

The Court of Appeals vacated and set aside the FCC order. Reviewing the extensive legislative history of Section 222 and the prior judicial and administrative decisions interpreting the Section, the court held that Section 222 prohibits WUTelCo from engaging in any international telegraph operations, whether the service to be provided existed in 1943 or was developed subsequently.

The court found that Congress in Section 222 divested the FCC of any authority or discretion to permit WUTelCo to engage in any international telegraph operations whatever. The court further found that the FCC itself consistently had held this view of Section 222 until its decision in the instant case.* The court found no merit in WUTelCo's argument that Section 222 was not intended to have any effect at all on WUTelCo's reentry into any aspect of international telegraph operations after divestment.** The court also found no legislative history to support, and much to contradict, the argument of the FCC that Section 222 was concerned only with the public message telegraph service extant in 1943 and that Congress

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* *Western Union Divestment,* 30 F.C.C. 323 (1961); *Telegraph Service with Hawaii,* 28 F.C.C. 599, *aff'd on reconsideration,* 29 F.C.C. 714 (1960); *Commercial Cable Co.,* 28 F.C.C. 283 (1960). It should be noted that *Telegraph Service with Hawaii* answers the precise Question Presented posed by WUTelCo's brief:

> "Under these circumstances, it [Congress] in effect withdrew our power under section 214 to authorize overseas service by Western Union as part of its domestic operations even if we believe such service to be required by the public convenience and necessity." 29 F.C.C. at 715.

** In *Western Union Telegraph Co.* v. *United States,* 217 F.2d 579 (21 Cir. 1954), a case dealing with the scope of the distribution formula created pursuant to Section 222(e), the court described as "ridiculous" the idea that Section 222 "contemplated strict surveillance of contemporary competition without also intending to limit the dangers of 'Western Union Cables' expansion in the future." 217 F.2d at 582.

had not intended Section 222 to cope with future technological and competitive developments.**

Although the FCC itself would have permitted WUTelCo to engage only in certain "new" international telegraph operations, the dissent argued that Section 222 was intended to deal only with the competitive situation in 1943 and, therefore, imposed no ban whatsoever on WUTelCo's reentry into international telegraphy. (WUTelCo Brief, App. A-17). Judge Mansfield did not take into account the facts that divestment occurred in 1963, twenty years after the occurrence of the "immediate anti-competitive consequences" that he felt Section 222 was exclusively concerned with and that the FCC had required WUTelCo to divest both pre- and post-1943 international operations. (WUTelCo Brief, App. A-17).

The petitions for rehearing of WUTelCo and the FCC were denied on April 22, 1977.

** The FCC's attempt to limit the scope of Section 222 to the technology and services and the competitive situation existing in 1943 is contradicted by the legislative history. FCC Chairman Fly testified in 1941 that the TWX system and leased channel services of AT&T accounted for 16.5% of the entire domestic telegraph industry, a share "second only to that of Western Union [WUTelCo]," and that any legislation which failed to consider the development of such services would contain "the seeds of its own destruction." Hearings pursuant to *S. Res. 95, supra* at 5, 19 (1941). He warned that if Congress enacted a limited statute that did not take into account the probability of future changes and developments in the industry, "we are likely to be back here in another decade." *Id.* at 234. Indeed, Section 222 on its face specifically provides for the ongoing restructuring of the telegraph industry by permitting WUTelCo to acquire telex, TWX, private line service and any other new telegraph operations of a competitor.

POINT I

WUTelCo's Effort to Obtain Judicial Repeal of Section 222 is Inappropriate in Light of the History of Continuing Congressional Review and Oversight of Section 222.

Following the decision of the Court of Appeals, the Senate passed a bill, S.1866, to make WUTelCo eligible to apply to the FCC for authority to provide mailgram and all other telegraph services to Hawaii.* (A-15). This bill, was recommended by the Senate Committee on Commerce, Science and Transportation with the intent of modifying the effect of the decision of the Court of Appeals.** *S.Rep. 95-389,* 95th Cong. (1st Sess.) (1977), included as Appendix A, *infra.* The Report acknowledged that Section 222 presently prevents the FCC from authorizing WUTelCo to provide mailgram service to Hawaii. (A7).***

This is the sixth time since 1945 that Congress has had occasion to reexamine the effect of Section 222 and to reconsider partial or total repeal of that bar against WUTelCo's engaging in international telegraph operations. The long history of Congressional concern with Section 222, the repeated willingness of Congressional committees to

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* The Senate passed S.1866 on August 5, 1977, 135 CONG. REC. S.13859 (1977).

** Enactment of S.1866 into law would permit WUTelCo to reapply to the FCC for permission to supply mailgram service to Hawaii. Because the present case arises solely from WUTelCo's application to provide mailgram service to Hawaii, enactment of S.1866 by Congress would render WUTelCo's petition academic.

*** The FCC drafted S.1866 in consultation with WUTelco and the IRCs. There has been no opposition to the bill expressed in Congress except by WUTelCo.

study the need for amendment to Section 222* and the FCC's position that only Congress can authorize WUTelCo to engage generally in international operations** strongly suggest that WUTelCo's present effort to achieve judicial repeal of Section 222 is inappropriate. The combined action of Congress and the FCC on each of these six occasions demonstrates a sensitivity to the complicated economic and technological problems arising from the creation of the domestic monopoly and a flexibility in dealing with them that the judicial branch of government cannot provide.

On five prior occasions WUTelCo sought Congressional repeal of the divestment provision of Section 222, making clear by its testimony that unless Section 222 were repealed, WUTelCo would not be able to offer any international telegraph services after divestment occurred. Congress refused on each occasion to modify the divestment provision. Certainly no more persuasive example of Congressional ratification could be offered. *See, e.g., Canada Packers, Ltd.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 385 U.S. 182, 184 (1966); *Power Reactor Devel. Co.* v. *International Union of Electrical Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 413-14 (1961).

In 1947 and 1959, WUTelCo convinced Congressional committees that its divestment obligation was unduly burdensome, but Congress refused to follow the committee recommendations to repeal or modify the divestment provision. *S.Rep. 19*, 80th Cong., 1st Sess. 7-8 (1947); *Hearings*

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* The Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce is presently studying the question whether Section 222 should be repealed SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, OPTIONS PAPERS, COMM. PRINT NO. 95-13, 95TH CONG., 1ST SESS. 476 (1977).

** *Telegraph Service with Hawaii, supra*, 28 F.C.C. 599, *aff'd on reconsideration*, 29 F.C.C. 714 (1960); (WUTelco Brief, App. D-28).

on S.4231 Before the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 11, 32 (1959).

In 1960, the FCC asked Congress to amend Section 222 to make clear that Hawaii remained an international point under Section 222 despite its admission to Statehood.* Congress approved that amendment despite WUTelCo's objections, thereby confirming its intention to prohibit WUTelCo from engaging in any international telegraph operations.

In 1962, WUTelCo again asked Congress to amend Section 222 to permit WUTelCo to enter into international telegraph operations using a proposed international communications satellite. *Hearings on S.258 Before a Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 87th Cong., 2d Sess. 455-56 (1962). The FCC opposed that request, and Congress refused to repeal the divestment requirement, though it enacted comprehensive legislation dealing with satellite communications, the Satellite Communications Act of 1962 (47 U.S.C. §§ 701 *et seq.*).

FCC Commissioner Robert E. Lee, testifying against repeal, reminded Congress of its 1943 finding that divestment was necessary to prevent WUTelCo from "discriminating in favor of its own [international] operation."

> "[T]he congressional committees concerned, the industry, and the Commission were consistently unanimous in their view that a divestment requirement should be an essential part of any bill authorizing a merger of domestic telegraph carriers. This position

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* The FCC announced its intention to seek such amendment in *Telegraph Service with Hawaii, supra*, 28 F.C.C. 599 (1960), in which the FCC reiterated the need for divestment and held that it lacked the power to authorize WUTelCo to provide such post-1943 services as telex.

was based on the undeniable premise that so long as the domestic telegraph monopoly was a major factor in the international field, it would be difficult if not impossible to prevent it from discriminating in favor of its own operations." *Hearings on S.3646 Before the Senate Commerce Committee,* 87th Cong., 2d Sess. 14 (1962).

During hearings on the bill, Samuel Barr, Vice-President of WUTelCo, acknowledged that Section 222 confined WUTelCo to domestic operations:

> "Senator Lausche: 'Now then, this law that was passed in the 40's declared that your business in the long run shall be confined to domestic service and not international. Is that correct?'
>
> Mr. Barr responding: 'That is correct,'" *Hearings on S.3646, supra* at 8.

Mr. Barr candidly testified that it had been "the thinking of the Congress . . . that Western Union [WUTelCo] should get out of the international field." *Hearings on S.3646, supra* at 9-10.

The Senate Interstate Commerce Committee Report expressly recognized that unless the divestment provision were repealed, the FCC would lack authority to permit WUTelCo to use satellites for purposes of international communication. As the Report stated,

> "If this divestment provision is not eliminated Western Union [WUTelCo] will be prohibited from operating in the international communications field and limited to domestic communications operations." *S. Rep. No. 1982,* 87th Cong., 2d Sess. 1 (1962).

The Committee Report recommended that WUTelCo be permitted to compete internationally in "the sale of broad-

band services, which can be used for transmitting voice, record data, facsimile, or any other type of digital communications.'"* *Id.* at 5. These hearings ultimately resulted in passage of the Satellite Communications Act of 1962. Yet, notwithstanding the efforts of WUTelCo and the recommendations of the Senate subcommittee, this comprehensive legislation preserved Section 222 without change.

In 1963, WUTelCo made a fifth unsuccessful effort to achieve repeal. *S.353,* 88th Cong., 1st Sess. (1963). Finally, on September 30, 1963, it divested itself of *all* of its international telegraph operations, including those developed in the interim between 1943 and 1963.

POINT II

The Decision of the Court of Appeals Will Not Affect the Present Structure of the Telegraph Industry or Have Any Other Significant Effect.

The decision of the Court of Appeals will not have any effect upon the structure of the communications industry, as it has evolved under a consistent line of judicial and FCC interpretations of Section 222. That decision will not limit competition among the five IRCs nor will it require the FCC to restrict competition in the domestic telegraph industry.

The Court of Appeals specifically considered and rejected WUTelCo's argument that exclusion of the IRCs from the domestic market is a necessary counterpart of the court's interpretation of Section 222 (WUTelCo Brief, App. A-10).

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* These types of satellite communications, of course, had not been carried on by WUTelco in 1943, but no one considered that fact to be of any significance. Yet under WUTelco's newly urged reading of Section 222, WUTelco could have been permitted to engage in such international operations despite the command of Section 222.

Section 222 was not intended to protect WUTelCo from competition by the IRCs or by any other communications company, and it does not guaranty WUTelCo a monopoly or give to it the right to prohibit competition in domestic telegraph services.*

WUTelCo's argument that the decision of the Court of Appeals is erroneous, because it is inconsistent with the general principle granting broad discretion to administrative agencies, lacks foundation in the present case. *See United States* v. *South Western Cables Co.*, 392 U.S. 157 (1963); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The Court of Appeals held, as the FCC itself has,** that Section 222 withdrew from the FCC authority under Section 214 to authorize WUTelCo to engage in international telegraph operations. Congress, of course, may restrict the otherwise broad discretion of an administrative agency, as it has done in Section 222. *See MCI Telecommunications Corp.* v. *FCC*, —— F.2d —— (D.C. Cir. slip op. 75-1635, July 28, 1977) at p. 21; *AT&T* v. *FCC*, 487 F.2d 865 at 880 (2d Cir. 1973). As this court itself has said:

> "The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to carry into effect the will of Congress as expressed by the statute'." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

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* *American Satellite Corp.*, 43 F.C.C. 348, 353-54 (1973). Section 222 *permits* WUTelCo to acquire competing domestic telegraph operations, when the FCC finds that to be in the public interest. Section 222(b)(1).

** *Telegraph Service with Hawaii*, 28 F.C.C. 599, *aff'd on reconsideration*, 29 F.C.C. 714 at 715 (1960).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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August 19, 1977

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APPENDIX A

Senate Report.

Calendar No. 357

95TH CONGRESS *1st Session*	SENATE	REPORT No. 95-389

AMENDING SECTION 222 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED

AUGUST 3 (legislative day, JULY 19), 1977.—
Ordered to be printed

Mr. INOUYE, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1866]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1866) to amend section 222 of the Communications Act of 1934, as amended, in order to include Hawaii in the same category as other States for the purposes of such section, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

PURPOSE

Section 222 was enacted in 1943, in the light of special circumstances then prevailing and 16 years before Hawaii was admitted to the Union. It is now 18 years since Hawaii became a State. Experience in these years has shown that the designation of Hawaii as an international

point for the purposes of section 222 has frustrated the efforts of the Federal Communications Commission and private industry to afford Hawaii similar treatment as her sister States. This disparity has resulted generally in higher rates for interstate communications to and from Hawaii, and in fewer services and facilities. Exclusion of Hawaii from the definition of "Continental United States" restricts the classes of carriers which are allowed to provide services to Hawaii. S. 1866 seeks to make available to Hawaii the same modern telecommunications facilities, services and rate-making principles which are now or will be enjoyed throughout the Continental United States. The amendment will accomplish this by including Hawaii within the definition of "Continental United States," thereby removing artificial constraints on the availability of telecommunications offerings, the entry of new carriers into the Hawaiian market and service integration into the mainland structure.

Brief Description

S. 1866 is intended to remove the anomalous designation of the State of Hawaii as an international point under section 222 of the Communications Act of 1934. The bill would amend section 222(a)(10) by including Hawaii within the definition of "Continental United States." The bill would remove the applicability of the international/domestic dichotomy to the Hawaiian market and would foster competition among all carriers serving that market. The bill would further amend section 222 by adding a new subsection, which would provide that carriers currently serving the Hawaiian market may continue to do so. Additionally, the bill would provide for the entry of additional carriers and the offering of new or additional services to the Hawaiian market, subject to the approval of the Federal Communications Commission.

Background and Need

Enactment of section 222

Prior to World War II, the two major companies providing domestic telegraph services on the U.S. mainland were The Western Union Telegraph Company and the Postal Telegraph and Cable Corporation. By 1943, both domestic telegraph companies were in serious financial trouble. Telephone services were making significant inroads into the telegraph market, leaving both telegraph companies with excessive and duplicative facilities. To solve this problem, Congress enacted section 222 of the Communications Act which created a statutory antitrust exemption to allow Western Union and Postal to merge. Congress was concerned, however, that the merged entity might utilize its new-found monopoly position in domestic telegraph service to favor its own international operation at the expense of its international record service competitors. To remove this danger, the merger legislation incorporated four additional provisions.

1. Western Union was required to divest itself of its international operations.

2. Domestic and international areas of service were defined and international record carriers (IRCs) could receive messages destined for international delivery, and hand over incoming messages destined for the hinterlands for delivery by Western Union.

3. Congress included a provision in section 222 requiring that Western Union distribute unrouted international telegraph among the overseas carriers according to "a just, reasonable and equitable formula".

4. In order to compensate Western Union for the use of its facilities for the delivery of international messages, section 222 provides that the parties negotiate a proper division of revenues. If an agreement cannot be negotiated,

the Commission is authorized to prescribe the division of revenues.

Hawaii designated as an international point

Congress drew the international/domestic dichotomy of section 222 largely on historical and geographic bases. Hawaii was not included in the definition of the domestic service area in 1943, and thus became an international location with respect to communication services. That designation was continued by congressional enactment of section 36 of the Hawaii Omnibus Act (Public Law 86-624, approved July 12, 1960) which added the phrase "except Hawaii" to section 222(a)(10). The legislative history indicates that the designation of Hawaii as an international point indicated that further study of the status of Hawaii was necessary:

> . . . to preserve, at least for the immediate future, Hawaii's exclusion from the definition (of the United States). As will appear below further consideration by the Federal Communications Commission may at a later date indicate that other or different amendments are desirable.
>
> Hawaii has historically been regarded as outside the United States for the purposes of the transmission of telegraph messages. . . . This exclusion was apparently based on geographical considerations, rather than on political status. . . .
>
> The amendment to section 222 is necessary now to maintain the status quo. . . . It may later develop, however, that different amendments may prove more suitable. The Federal Communications Commission has instituted an inquiry. . . . the purpose of which is to enable the Commission to receive from interested parties their views as to what changes in the Communications Act, if any, the Commission should recommend to Congress. Before making a determination as to what changes it recommends, other than the foregoing which would merely preserve current arrangements, the Federal Communications Commission will require more time to complete its inquiry.

The Commission did not recommend a change. In its 1960 decisions, *Telegraph Service With Hawaii,* 28 F.C.C. 599 and 29 F.C.C. 714, the Commission found that a change in status at that time promised no benefits for Hawaii.

Whatever validity the exclusion of Hawaii from domestic services may have had in the past, it would seem to have been lessened by the revolutionary changes which have taken place in communications technology and concurrent development of entirely new service concepts.

Domestic satellites are insensitive to distance or terrain crossed. They can be used to provide service between the contiguous States and Hawaii at far less additional cost than was the case when only submarine cable technology was available. There now are numerous services and potential rate advantages that are likely to accrue to Hawaii by a change in status.

Current industry structure

(a) *Domestic carrier.*—Today, Western Union retains its monopoly position in providing domestic telegraph service to the continental United States. In domestic record services, other than telegraph, Western Union faces competition from A.T. & T., specialized, resale, and satellite carriers who now offer a wide range of services capable of satisfying diverse customer requirements.

(b) *International record carriers.*—There are four major international record carriers: ITT, RCA, WUI and TRT. Three of these, RCA, ITT and WUI, serve Hawaii and, in combination, have direct circuits to virtually every major communications center throughout the world. TRT

has recently been authorized to expand its service area. The French Cable Company and U.S. Radio-Liberia, a subsidiary of Firestone Rubber, serve limited areas in Europe and Africa.

(c) *Other international carriers.*—The American Telephone and Telegraph Company (A.T. & T.) provides all message telephone service and all voice-only private line services from the United States mainland to international points. The Hawaiian Telephone Company (HTC) provides international and interstate, as well as intrastate, services for Hawaii. As A.T. & T.'s correspondent, it provides all those services A.T. & T. is authorized to provide between Hawaii and the mainland. The Communications Satellite Corporation (Comsat), a carrier's carrier, leases satellite circuits to end service carriers.

Technology and services

The sophistication of today's international record market results in large measure from the development of high quality transmission facitities. High capacity voice-grade submarine cables and satellite facilities have virtually replaced telegraph cables and HF radio for media used for overseas transmissions in 1943, and are today the backbone of the international record industry. The global satellite communications network, independently, makes possible new and innovative record and voice services, as well as international television relay, and reaches global points which cables cannot serve.

Voice-grade circuits in both cables and satellites are capable of transmitting alternate and simultaneous voice/data, facsimile and high-speed data and may be subdivided for telegraph and telex transmissions. Although public message telegraph service was the first and for many years the predominant international record service, by 1974, telegraph revenues represented only about 13 percent of total international record service revenues, with

telex and leased lines accounting for 55 and 25 percent of the industry's revenues, respectively. Telex is a teletypewriter exchange system directly linking a customer's office with any other party on a carrier's telex network. A leased channel, on the other hand, is a circuit dedicated to a single customer or customer group. Leased channel services may include teleprinter, data, facsimile, alternate voice/data, and simultaneous voice/data transmission.

Impact of section 222 upon Hawaiian communications

Disagreement as to the scope of section 222 has contributed greatly to the delay in securing new services, better rates, and new facilities for Hawaiian points. For example, because of section 222's designation as Hawaii as an international point, the Commission could not authorize provision of Western Union's MAILGRAM service. Additionally, integration of Hawaii into the domestic rate and service structure has been a long, difficult process due, at least in part, to section 222 complications.

The major class of service offerings not now available to Hawaii are those being offered on the mainland for the first time by new carriers in the competitive market. For example, Graphnet, Telenet, Tymnet, Southern Pacific and MCI are offering numerous specialized domestic services. These services consist of switching and private line services designed to meet the growing communications needs of mainland customers. AT&T has introduced Dataphone Digital Service—a private line service offering two-way transmission of digital signals at various synchronous speeds—also not available to Hawaii. Finally, as a result of the Federal Communications Commission decision prohibiting restrictions on the resale and shared use of most carrier offerings, additional services will soon be offered on the mainland. The resale and shared use decision does not apply to Hawaii, since Hawaii is classified as an international point. Many record services now offered by Western Union on the mainland are not currently offered

to Hawaii through the IRCs. Included in this group of services are Braille Gram, Data Gram, Data Comm, Infomaster (stored and forward message switching), and miscellaneous new ticker services. While it is not possible to identify which of these services and carriers, and any future services or carriers, may be competitively viable in the Hawaiian market, artificial statutory constraints should not hamper their availability.

A hearing was held on S. 1162, a bill to repeal section 222, in Hawaii on April 15, 1977. Although S. 1162 is broader in scope than S. 1866, the field hearing was narrowly focused on the effect of section 222 on Hawaiian telecommunications. A subsequent hearing on S. 1866 was held in Washington, D.C., on July 21, 1977. In the two days of hearings, nearly all witnesses, including representatives from the State of Hawaii, the Federal Communications Commission, the IRCs, the Office of Telecommunications Policy, and Hawaiian business and consumer groups testified in favor of extending to Hawaii telecommunications services comparable to those available in the continental United States. On August 2, 1977 the Committee on Commerce, Science and Transportation, meeting in open executive session, ordered S. 1866 reported with an amendment.

Section-by-Section Analysis

Section 1 has the effect of including Hawaii within the definition of "Continental United States." Such inclusion would remove those statutory constraints contained in section 222 which have prevented Hawaii from enjoying services available to her sister states on the mainland. Other aspects of international record communications to and from foreign points are not affected by this legislation.

In removing Hawaii from being designated as an international point, the committee does not intend, by this

legislation, to prevent existing carriers from providing services to Hawaii which they are now providing. Nor does the committee wish to prejudice these carriers' eligibility for additional authority for new or expanded services in the future. The committee's intent is to open Hawaii to new services and carriers not now available because of section 222's designation of Hawaii as an international point. The committee does not wish, by redesignating Hawaii as a domestic point, to automatically obliterate existing services or to sanction unfair or predatory competition.

Section 2 would add a new subsection (g) to section 222. New subsection (g)(1) would insure that no existing carrier can be barred from offering services it was authorized to offer on the date of enactment of S. 1866 as reported solely as the result of the enactment of this legislation. Subsection (g)(2) would authorize the Commission to protect the public interest by ensuring fair competition among currently existing and future carriers in the Hawaiian market.

The committee does not intend to prejudice the existing rights of the international record carriers currently offering competitive services to Hawaii. Nevertheless, the provisions contained in subsection (g) should not be read as permanently vesting any "rights" to the Hawaiian market in carriers currently serving Hawaii. Nor should new subsection (g)(1) be construed as preempting the FCC's authority to ultimately make the public interest determination of which carriers should serve Hawaii. Subsection (g)(1) should be construed only as assuring that the IRC's may continue to offer existing services to Hawaii and that these services and their authority to serve Hawaii should not be disrupted merely because by enactment of this legislation Hawaii has become a domestic point. The new subsection should not be read as a section 214 grant of authority in perpetuity. Rather, subsection (g)(1) merely preserves, rather than freezes, the status

quo until such time as the FCC determines that new carriers or services may be introduced into the Hawaiian market. In fact, the committee anticipates that there may be new entrants into the Hawaiian market, and these new entrants may be introduced on top of the carriers and services presently serving Hawaii or in lieu thereof; whatever is in the public interest of the United States as a whole.

The committee is aware of the current debate over whether section 222 bars the IRC's entry into the domestic market in the hinterland. The committee wishes to indicate that the rights of the IRC's in Hawaii to Mainland service under the new subsection (g)(1) should not be presumed to reflect new Congressional views on the IRC's authority to provide service directly to the hinterland. subsection (g)(1) is merely intended to assure continuity in service now being provided by the IRCs betwen Hawaii and the gateway cities. Section (g)(1) would insure that the ownership and operation of the three submarine cables between Hawaii and the mainland by the IRC's, ATT and their foreign correspondents will not be disturbed merely by virtue of enactment of this bill.

On the other hand, the committee does not wish to protect existing carriers or services from the forces of fair competition or from regulatory decisions arrived at for reasons other than those arising from Hawaii's change in status from an international to a domestic point. Nothing in this subsection should be construed as guaranteeing the continued size, market share, or even the continued existence of that service or carrier. Indeed, it is conceivable that existing services or carriers might decline or disappear under the pressure of fair competitive forces.

This entire subsection should in no way be construed as affecting the Commission's authority under any other sections of the Communications Act of 1934, as amended.

In addition to encouraging increased competition among carriers providing services to the people of Hawaii, these

amendments to section 222 would apply to Hawaii the regulatory and judicial decisions which have stimulated the introduction of new telecommunications equipment and services, expanded consumer choice and consumer rights for mainland citizens. Specifically, the committee's intent is to open up Hawaii to new services and carriers not now available to Hawaii by reasons of section 222's designation of Hawaii as an international point, as they now exist in this market. The committee does not presume that the Commission would automatically grant the entry of any specific new carrier into the Hawaiian market. The committee believes when the Commission applications for section 214 authorizations from either existing IRCs or new carriers (including Western Union) to serve the Hawaiian/mainland market, it should continue to apply its procompetitive policies and guidelines, in the public interest.

This amendment to section 222 will not automatically trigger any restructuring of the telecommunications industry or any new entry by either Western Union or the international record carriers into markets presently foreclosed to them. It will simply remove an arbitrary and inflexible statutory barrier to any Commission consideration of the proper role of domestic and international carriers in providing service to Hawaii.

The advent of communications satellites has also made practical the international carriage of broadband television signals. While television transmission service is not considered a record service, the international carriers offer this service on a rotational basis with A.T. & T. Following the inclusion of Hawaii within section 222's definition of the "Continental United States," the committee believes that the Commission should consider the feasibility allowing television transmission service to Hawaii on a competitive basis.

In amending section 222 to make Hawaii a domestic point, the Committee expects the Commission to monitor the developments in the Hawaiian market and to safe-

guard the public interest. Under subsection (g)(2), if the Commission finds that any charge, classification, regulation or practice relating to intercarrier arrangements is or will be unjust, unreasonable, discriminatory or not in the public interest, the Commission shall prescribe action to protect the public interest. In addition, when any person believes that any charge, classification, regulation or practice relating to an inter-carrier arrangement is unjust, unreasonable, discriminatory, or not in the public interest, he has the right to apply to the Commission for a hearing on the issue.

Cost Estimate

In compliance with section 403 of the Congressional Budget Act of 1974, the committee requested the Congressional Budget Office to prepare a cost estimate for S. 1866, which is included in its entirety as follows:

Congressional Budget Office,
U.S. Congress,
Washington, D.C.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1866, a bill to amend section 222 of the Communications Act of 1934 in order to include Hawaii in the same category as other States for the purposes of that section; as ordered reported by the Senate Committee on Commerce, Science, and Transportation.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

Alice M. Rivlin, *Director.*

Regulatory Impact Statement

The committee believes that S. 1866 would not have any direct impact on the existing regulatory environment. The committee does not believe that the legislation would have any significant effect on FCC regulations or procedural requirements. While the purpose of the bill is to make it possible for the existing domestic record carrier as well as the international record carriers to serve the Hawaiian market, the committee cannot estimate at this time just which carriers will avail themselves of the opportunities afforded by the legislation. Although the committee believes that enactment of the bill would foster competition and result in more effective service in the Hawaiian market, the committee has been unable to obtain specific predictions of the economic impact on businesses or individuals affected by the legislation. The committee has no reason to believe that there will be any impact on personal privacy of businesses or individuals affected by this legislation. The committee believes that FCC paperwork requirements would not be substantially increased as a result of this legislation.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is shown in roman):

Section 222 of the Communications Act of 1934, as Amended

(a) (1) * * *.

* * * * * * *

(10) The term "Continental United States" means the District of Columbia and the States of the Union [, except Hawaii].

* * * * * * *

"(g) (1) The authority of any carrier to provide any service or operate any facilities which it is authorized to provide or operate on the date of enactment of this subsection shall not be altered solely by the inclusion of Hawaii within the definition of Continental United States, nor shall such inclusion restrict or impair any carrier's eligibility after the date of enactment of this subsection for new or additional authority.

"(2) Whenever, upon a complaint or upon its own initiative, and after opportunity for a hearing, the Commission finds that any charge, classification, regulation, or practice relating to inter-carrier arrangements of any carrier serving Hawaii is or will be unjust, unreasonable, discriminatory, or not in the public interest, the Commission shall determine and prescribe what charge, classification, regulation, or practice, or such other remedy as is or will be just, reasonable, nondiscriminatory and in the public interest to be thereafter followed.".

TEXT OF S. 1866, AS REPORTED

To amend section 222 of the Communcations Act of 1934, as amended, in order to include Hawaii in the same category as other States for the purposes of such section

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 222(a)(10) of the Communications Act of 1934 (47 U.S.C. 222(a)(10)), as amended, is amended by striking out ", except Hawaii".

SEC. 2. Section 222 of the Communications Act of 1934 (47 U.S.C. 222), as amended, is further amended by adding at the end thereof the following new subsection:

"(g)(1) The authority of any carrier to provide any service or operate any facilities which it is authorized to provide or operate on the date of enactment of this subsec-

tion shall not be altered solely by the inclusion of Hawaii within the definition of continental United States, nor shall such inclusion restrict or impair any carrier's eligibility after the date of enactment of this subsection for new or additional authority.

"(2) Whenever, upon a complaint or upon its own initiative, and after opportunity for a hearing, the Commission finds that any charge, classification, regulation, or practice relating to inter-carrier arrangements of any carrier serving Hawaii is or will be unjust, unreasonable, discriminatory, or not in the public interest, the Commission shall determine and prescribe what charge, classification, regulation, or practice, or such other remedy as is or will be just, reasonable, nondiscriminatory and in the public interest to be thereafter followed.".

APPENDIX B

Decision of FCC Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

April 19, 1972

IN REPLY REFER TO:
9500

The Western Union Telegraph Company
7916 Westpark Drive
McLean, Virginia 22101

Attention: P. S. Schenk, Group Vice President
R. W. Stone, Assistant Vice President

Gentlemen:

1. I am writing with respect to your recent application, filed April 4, 1972, requesting authority pursuant to Section 214 of the Communications Act of 1934 to lease and operate facilities between the 48 contiguous United States and the State of Hawaii for the purpose of extending The Western Union Telegraph Company (WUTC) MAILGRAM service to include the provision of MAILGRAM between the Mainland and Hawaii.

2. As your application implicitly indicates, a threshold question to be determined prior to acceptance of such application for filing is whether WUTC may, as a matter of law under the provisions of Section 222 of the Communications Act of 1934, provide such service. For the reasons indicated below, it appears that such section does prohibit WUTC from engaging in such service, and we, therefore, are unable to accept such application for filing but will not return it pending disposition on any timely filed petition for reconsideration by WUTC. This action is taken pursuant to authority delegated to the Chief, Common Carrier Bureau, by 47 C.F.R. § 0.294.

3. We have carefully reviewed your arguments, set out at Pages 5-8, inclusive, of the proposed application, that Section 222 does not preclude WUTC from offering its proposed service, and they appear to be as follows:

a. That Section 222 refers to international telegraph operations *theretofore* carried on by WUTC, but does not preclude it from ever again engaging in international telegraph operations;

b. that MAILGRAM service is a *new* service, and not one "theretofore" carried on, and moreover will be provided by means of a medium—satellite—not in existence at the time Section 222 was enacted;

c. that accepted principles of statutory construction provide for a narrow construction of a "flat prohibition";

d. that it would be unreasonable to assume that Congress intended to preclude WUTC from engaging in future types of international record service, irrespective of public benefit, since the Commission would have full authority under Section 214 to disallow any such service it did not believe to be in the public interest;

e. that the proposed Second Report and Order recommended by the Bureau, and attached to the Commission's Memorandum Opinion and Order issued March 17, 1972 in Docket No. 16495 is dispositive of this issue in favor of WUTC.

4. Section 222 was added to the Act in 1943 to permit WUTC to acquire Postal Telegraph, which was in imminent financial danger of failure. As a condition to allowing this merger of domestic telegraph carriers, Section 222(c)(2) required that any party to the consolidation or merger must divest itself of "international telegraph operations theretofore carried on." Congress defined

domestic and international telegraph operations solely on the basis of geographical rather than political delineation. (See Sections 222(a)(5) and 222(a)(6).) Section 222(a)(10), which defines "continental United States", was amended in 1960[1] after the admission of Hawaii to statehood to preserve Hawaii's exclusion from the definition of continental United States. Thus communication between the Mainland and Hawaii remained classified for the purpose of Section 222 as "international operations" and specifically excluded Hawaii from inclusion under "domestic telegraph operations."[2] This amendment was necessary to maintain the *status quo;* i.e., telegraph operations between the Mainland and Hawaii are international operations and WUTC is precluded from engaging in such operations, inasmuch as without such an amendment, it could reasonably be argued that Hawaii had, with its admission to statehood, become a part of "domestic telegraph operations" for purposes of Section 222.

5. *Initially,* we note that an examination of the legislative history of the divestment requirement set out in Section 222(a)(2) leads to the conclusion that Congress did intend to preclude WUTC from engaging in future "international

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[1] Hawaii Omnibus Act § 36, 47 U.S.C. § 222(a)(10) (1970).

[2] *See,* H. R. Rep. No. 1564, 86th Cong., 2d Sess. 3 (1960) which states: "In a few instances it has been found desirable, notwithstanding Hawaii's admission to statehood, to maintain existing arrangements in Hawaii or between Hawaii and the mainland which differ from those in or between the other states. These cases do not affect "the equal footing" doctrine, but grow out either of Hawaii's geographic location or of historical developments which cannot be ignored; . . . [P]rovision is likewise made . . . for maintenance (at least until the Federal Communications Commission reviews the matter thoroughly) of the treatment of telegraphic operations between the mainland and Hawaii as international rather than as domestic in character; . . ."

For further discussion see pages 17-18 of the above-mentioned House Report.

telegraph operations" as that term is defined in Section 222. Thus, in S. Rep. No. 13, 78th Cong., 1st Session (1943), on S. 158 (which became Section 222), it was noted, at Page 4, that, as a result of a study of the telegraph industry conducted by the Senate Committee on Interstate Commerce, it was recommended that Congress approve an amendment to the Communications Act which "should define 'domestic' and 'international' carriers . . . and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself *solely* to domestic telegraph operations if found to be in the public interest . . ," (Emphasis added.)[3]

6. In Docket No. 13188, *In the Matter of Amendment of the Communications Act of 1934, as Amended, Relating to Telegraph Service with Hawaii*[4], WUTC alleged that it planned to offer telegraph message, telex, leased line, and money order services between the Mainland and Hawaii and, therefore, requested that Section 222 be amended to permit it to serve Hawaii as part of its domestic telegraph operation.[5] Before we discuss the Commission's response to this request, it is appropriate to note an inconsistency in WUTC's advocacy in the instant application as compared with that followed in Docket No. 13188. WUTC argues that MAILGRAM is a new and innovative service which was not theretofore carried on prior to the merger

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[3] S. 158, with one minor exception not germane to this inquiry, was identical to S. 2598 passed by the Senate in the 77th Congress, 2d Session. Senate Bill 2598 was favorably reported by the House Interstate and Foreign Commerce Committee (H. Rpt. No. 2664) but was not acted upon in the House because of lack of a quorum. The Report (No. 1490) of the Senate Interstate Commerce Committee on Senate Bill 2598 is fully applicable to Senate Bill 148 and was therefore incorporated verbatim in Senate Report No. 13 on Senate Bill 158.

[4] 28 F.C.C. 599 (1960).

[5] *Id.* at 609.

of WUTC and Postal Telegraph and that, consequently, the scope of Section 222 would not encompass or preclude this service. The same argument could have been made for the provision of telex service between the Mainland and Hawaii in 1960, as telex was a new and innovative service which was first offered commercially, on a very limited scale, in the United States in 1958; telex would thus be a service not theretofore offered prior to the merger of WUTC and Postal Telegraph. However, WUTC apparently did not think this argument had merit in 1960 when it requested that Section 222 be amended to allow them to provide telegraph services—including telex—between the Mainland and Hawaii.

7. It is obvious from the instant application, that no matter how new and innovative MAILGRAM service may be, it is basically a telegraph service, inasmuch as the essential transmission will be performed by WUTC, with delivery by the Post Office at destination. Moreover, it is obvious that MAILGRAM service will be a serious contender for a portion of the present market for message telegraph services between the Mainland and Hawaii presently offered by the international record carriers individually or jointly with Western Union. There is nothing to preclude Western Union and one or more international record carriers from entering into arrangements similar to those now in effect with respect to message traffic for the rendition of MAILGRAM service to Hawaii.

8. In its May 11, 1960 decision in Docket No. 13188, concerning telegraph service to Hawaii, the Commission stated:

> "We must conclude therefore that in Section 222 Congress intended that, as a condition to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier, must withdraw from competition

with the international telegraph carriers to overseas points, whether they be foreign points or interstate points under Section 3."[6]

9. The Commission further concluded that:

> "Since service to any of these points [i.e., Hawaii, Puerto Rico, and the Virgin Islands] is undoubtedly an international telegraph operation, we cannot order or permit Western Union to provide such service, no matter how urgent the public interest. If we find that the public interest requires that we should possess such power, the remedy is to ask Congress to amend Section 222, not for us to misinterpret it."[7]

10. Insofar as WUTC quotes from the attachment to the Commission's recent decision in Docket No. 16495, it misunderstands the thrust of the intent of the language, which is revealed by a full reading of the context from which the cited language is taken. The question there being considered was whether WUTC was precluded by Section 222 from owning an earth station in Hawaii as part of a domestic system since Section 222(a)(10) excludes Hawaii from the definition of "continental United States." WUTC failed to quote the following language, which appears in the same paragraph as the language it cites:

> "In the event we determine as a matter of policy that Hawaii should be included in a domestic system, there would seem to be no warrant for disqualifying Western Union alone from having any earth station interest there, particularly if the principal use of the earth station is for television program reception and other specialized services and Western Union is pre-

[6] 28 F.C.C. 599, 604 (1960).

[7] *Id.* at 605.

> cluded from providing telegraph service between CONUS and Hawaii."[8]

As we have noted above (Paragraph 7), the proposed MAILGRAM service is basically a telegraph service and, therefore, is covered by the last clause of the language above quoted.

11. In summary, therefore, we conclude:

a. The proposed service is an international telegraph service;

b. Section 222 is intended to preclude WUTC from providing future international telegraph services, as well as those provided in 1943, in competition with the independent international telegraph carriers; and

c. the Commission, therefore, has no authority to grant the instant application, even if it were considered in the public interest, absent an amendment of Section 222 of the Communications Act.

Sincerely yours,

Bernard Strassburg
Chief, Common Carrier Bureau

[8] Commission Memorandum Opinion and Order, FCC 72-229 at 56-57, 37 Fed. Reg. 5866, 5883 (1972). To the extent that the referenced language in the staff recommendation may lend itself to a construction that an offering of the subject service to Hawaii by Western Union is permissible under Section 222, the language in question should be amended to remove the basis for any such possible construction.

APPENDIX C

Relevant Statutes

All references are to the Communications Act of 1934, as amended.

* * * * *

Section 222, 47 U.S.C. § 222:

(a) As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico or Newfoundland and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided,* That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada,

Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

• • • • •

(10) The term "continental United States" means the District of Columbia and the States of the Union, *except Hawaii.* (emphasis added)

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic

telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) . . . (2) *Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger,* within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can. (emphasis added).

• • • • •

(e) (1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers shall fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public

interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

• • • • •

Section 314, 47 U.S.C. § 314:

After the effective date of this chapter [1934] no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this chapter shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire

messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

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v.

WESTERN UNION INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

In this case a divided court of appeals vacated and set aside (Pet. App. A) the order of the Federal Communications Commission in *The Western Union Telegraph Co.*, 55 FCC 2d 668 (Pet. App. D). The Commission had ruled that Section 222 of the Communications Act of 1934, 57 Stat. 5, as added and amended, 47 U.S.C. 222, did not prohibit petitioner ("Western Union") from leasing and operating facilities to extend Mailgram[1] service between the mainland of the United States and Hawaii.

---

[1] "*Mailgram*" is a service whereby subscribers' messages are computer-routed by Western Union, over circuits specifically dedicated to Mailgram service, to pre-selected Post Office locations throughout the country. Postal employees take the messages off teleprinters and mail them to the addressees so that they are usually received by the next working day.

Section 222 was added to the Communications Act in 1943 to authorize the merger into Western Union of the Postal Telegraph Cable Co. Because Western Union had extensive international operations, Congress was concerned that the domestic monopoly resulting from the merger, through coordination of its domestic operations with its international operations, might cause unfair competitive injury to other international carriers (Pet. App. A-8). To forestall this development, Congress provided in Section 222(c)(2) that Western Union would have to divest itself of its international operations.[2] The merger was consummated, Western Union acquired a domestic monopoly, and in 1963 the required divestiture of its international services was completed (Pet. App. A-7).

Under Section 222 as enacted in 1943, Hawaii was not included in the definition of the domestic service area to be served by the merged company because it was not one of the States of the Union. Section 222(a)(5)(10). It was therefore an international point for record message service. When Hawaii was admitted to statehood, Congress amended the definition of domestic service so as to continue the treatment of Hawaii as an international point. Hawaii Omnibus Act, Section 36, 74 Stat. 411, 421.

In 1972 Western Union applied to the Commission under 47 U.S.C. 214 for authority to furnish Mailgram service to Hawaii. The Commission's Common Carrier

[2]Section 222(c)(2) provides:

> Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission * * *.

Bureau rejected the application (Pet. App. D-2). On review, the Commission granted it, holding that the Section 222(c)(2) requirement of divestiture of Western Union's international operations did not "impose upon WU an all-encompassing bar to future international or overseas operations" (Pet. App. D-20). The court of appeals rejected this holding, concluding from its examination of the legislative history and the Commission's prior decisions that Section 222(c)(2)'s divestment directive "was meant as a continuing bar to WU's involvement in international record communications, which would include Mailgrams" (Pet. App. A-14).

Because Congress is actively considering legislation which would moot this case by authorizing Western Union to provide service to Hawaii, review by this Court of the court of appeals' construction of Section 222(c)(2) is unwarranted.

On August 5, 1977, the Senate passed S. 1866, 95th Cong., 1st Sess., which would amend Section 222 to include Hawaii in the same category as other states. 135 Cong. Rec. S 13859 (daily ed., August 5, 1977). See S. Rep. No. 95-389, 95th Cong., 1st Sess. (1977). For the reasons set forth in its decision (Pet. App. D), and Judge Mansfield's dissenting opinion (Pet. App. A-15—A-21), the Commission believes that the decision of the court below is erroneous, and it would so contend if this Court were to grant

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THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER THE WESTERN UNION TELEGRAPH COMPANY

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INTRODUCTION

The petitioner, The Western Union Telegraph Company (the "Telegraph Company") submits this brief in reply to the briefs in opposition to the petition for certiorari which were submitted by respondents Western Union International, Inc. ("WUI") and ITT World Communications, Inc. ("ITT").

In the decision below (App. A)[1] the United States Court of Appeals for the Second Circuit held that the Federal Communications Commission lacks authority to consider whether the Telegraph Company may provide Mailgram or any other telegraph (or "record") service internationally. Our petition demonstrates that this decision imposes a structure upon the telegraph industry which is at odds with the Commission's view of the public interest; that it conflicts with the view of the Communications Act adopted by this Court; and that it requires reexamination of a line of Commission opinions aimed at fostering competition among suppliers of new record services. It is neither appropriate nor necessary to submit further argument concerning these points[2]. However, we are obliged to note our surprise with respondent ITT's arguments that the Telegraph Company's petition "does not present an important question of federal law" and that the statute involved "is applicable to a single litigant". (ITT Opposition, p. 10). In its brief to the Second Circuit, ITT explained that it intervened on behalf of WUI's petition for review of the FCC's order "[b]ecause the Court's decision will have a major impact on the future structure of the international telegraph industry . . ." . (ITT Second Circuit Brief, p. 13). No reason is or can be given for ITT's reassessment of its earlier view of the significance of this case.

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[1] References in the form "App." followed by capital letters A through E are to pages of the appropriate Appendix to the Telegraph Company's petition.

[2] However, for the convenience of this Court, we have annexed as Appendix F, the "Petition of the Federal Communications Commission for Rehearing and Suggestion for Rehearing *En Banc*" filed with the Second Circuit on November 3, 1976. This document was referred to in our petition (p. 12) but was not included in the appendices.

The respondents' Briefs present two principal contentions: (1) that the construction of the divestment requirement urged by the Telegraph Company and Judge Mansfield, in dissent, would leave the Telegraph Company "unrestrained" from immediately reacquiring the very assets it was ordered to divest (ITT Opposition, p. 16) and (2) that prior legislative review of Section 222 constitutes "[c]ongressional ratification" of the Second Circuit holding. (WUI Opposition, p. 10). These contentions are without merit.

I.

Since the Communications Act Provides Ample Administrative Control Over Any Abuse by the Telegraph Company In the Furnishing of International Services, There is No Need to Read Section 222(c)(2) As a Complete Bar to the Telegraph Company's Re-Entry into the International Marketplace

ITT contends that if Section 222(c)(2) is not read as a continuing barrier to the Telegraph Company's resumption of international operations, the Telegraph Company will be "unrestrained from reacquiring the very assets they were ordered to divest" (ITT Opposition, 16). This analysis ignores the Commission's ability to regulate international competition under Section 214, and the Commission's extensive powers under Sections 204 and 205 of the Communications Act to proscribe unfair practices of any carrier. This case illustrates the point. Reversal of the judgment below would not effect the Telegraph Company's re-entry into the international market but would merely permit the Commission to entertain an application by the Telegraph Company for Section 214 authority to provide its Mailgram service between Hawaii and the

mainland. In considering the Telegraph Company's application, the Commission would be required under Section 214 to determine not only whether the service would result in improved communications, but also whether the Telegraph Company would have an unfair competitive advantage if it were to provide the service. Moreover, under Section 214(c), the Commission has the power to attach "to the issuance of the certificate such terms and conditions as in its judgment" may be required. Thus, the construction of Section 222 for which we contend would not permit "unrestrained" re-entry by the Telegraph Company into international telegraph operations.

While ITT does not acknowledge the Commission's power to control the abuses it alleges would arise from the Telegraph Company's operation of an Hawaii Mailgram service, it relies, paradoxically, upon Sections 214 and Sections 201-205 of the Communications Act in asserting that

> "should the IRCs ever fail to provide adequate service at reasonable rates, the FCC has more than adequate powers under the Communications Act to require them to do so." (ITT Opposition, p. 12).

Respondents thus assert the odd proposition that the Communications Act affords the Commission adequate powers to control IRC abuse, but that the same powers would not be available to prevent abuses threatened by the Telegraph Company's conduct of the same international operations. However, it is clear that the same Commission powers to control IRC abuses, enable the Commission to control any abuses which might be threatened if the Telegraph Company were permitted to engage in international operations.

II.

The IRC's Reliance Upon Post-1943 Legislative History Is Misplaced

WUI attaches great significance to the fact that Congress did not enact bills offered subsequent to 1943 that proposed repeal of the divestment requirement, and concludes that "no more persuasive example of Congressional ratification could be offered." (WUI Opposition, p. 10). Despite WUI's prolific references to legislative history, it remains unclear as to what Congress can be said to have ratified. Congressional refusal to repeal the divestment requirement sheds no light upon whether Section 222(c)(2) imposes a post-divestment barrier to the Telegraph Company's re-entry into international operations. Furthermore, a failure to enact amending legislation is not relevant in interpreting a statute because:

> "Logically, several equally tenable inferences can be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." *United States* v. *Wise,* 370 U.S. 405, 411 (1962).

Similarly, congressional consideration of legislation aimed at designating Hawaii a domestic point does not dispose of the important issues raised by the Second Circuit's opinion. (WUI Opposition, Appendix A). The impact of the decision below is not limited to exclusion of the Telegraph Company from the Hawaiian market. It applies to all forms of record services and every international point. Furthermore, as indicated in our petition (pp. 10-12), the statutory analysis which underlies the

Commission's Mailgram order also supports a line of cases authorizing the IRCs' entry into the domestic communications market. *RCA Global Communications, Inc.*, 42 F.C.C. 2d 744, 780 (1973); *American Satellite Corp.*, 43 F.C.C. 2d 348, 353-54 (1973); *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859, 862 (1974). The far-reaching implications of the present case are in no way affected by the legislation presently under consideration.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC., *Petitioner,* v. FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, *Respondents,* ITT WORLD COMMUNICATIONS, INC., STATE OF HAWAII, WESTERN UNION TELEGRAPH COMPANY, *Intervenors.*	No. 75-4132

PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Respondent Federal Communications Commission hereby petitions for rehearing pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.[1] En banc rehearing is respectfully suggested because the majority opinion is in conflict with judicial precedent, and overturns an administrative decision on the basis that the

[1] Hereinafter, citations to the above-captioned case will be to the slip opinion (Slip Op.), decided October 20, 1976.

agency lacks authority, where there is no "compelling evidence that such was Congress' intention." *Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1967); *United States v. Southwestern Cable Co.,* 392 U.S. 157, 177 (1960).

Basically, the order under review was a decision by the Commission that the Western Union Telegraph Co. (WU) is eligible to apply for authority to lease and operate facilities between the continental United States and the State of Hawaii for the purpose of extending WU's recently developed Mailgram service[2] to Hawaii. The majority of the panel assigned to hear the case held that §222(c)(2) of the Communications Act, 47 U.S.C. 222(c)(2) prohibited the Commission from considering such an application.

Congress added Section 222 to the Communications Act in 1943 to permit Western Union to merge with the failing Postal Telegraph Cable Co. In order to insure that the merged WU Company would not be able to use its newly found domestic public message telegraph monopoly to favor its own international message operations, Congress imposed certain safeguards. Among these was §222(c)(2) which provides in pertinent part:

> (2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the *international telegraph operations theretofore*

[2] "Mailgram" is a service whereby subscribers' messages are computer-routed by WU, over circuits specifically dedicated to Mailgram service, to pre-selected Post Office locations throughout the country. Postal employees take the messages off teleprinters and mail them to the addressees so that they are usually received by the next working day.

> *carried on* by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission . . . . (Emphasis added).

The Court summarized its holding as follows:

> In short, §222(c)(2)'s directive as to the divestment by the merged domestic carrier (WU) of "international telegraph operations theretofore carried on by any party to the consolidation or merger" was meant as a *continuing bar* to WU's involvement in international record communications which would include mailgrams. This was the price paid by the company for the acquisition of a domestic monopoly over telegraph service.

Slip Op., at 171 (Emphasis added).

We respectfully submit that the majority has reached a conclusion which distorts the common and legal definitions of the word "divestment," is contrary to the clear import of the statute, and is not supported by the legislative history.

The term "divestment" has a clear and unambiguous meaning. It is defined as "the compulsory transfer of title or disposal of interests (as stock in a corporation) upon government order." Webster's Third New International Dictionary (1971).

The Courts deal most frequently with divestment orders in the context of framing antitrust decrees. It is generally accepted that such decrees are "two-fold in character" *Standard Oil Co. v. U.S.,* 221 U.S. 1, 78 (1910):

> 1st. To *forbid the doing in the future* of acts like those . . . found to have been done in the past which would be violative of the statute. 2d. The exertion of

such measure of relief as will effectually *dissolve the combination* found to exist in violation of the statute. . . .

Ibid. (Emphasis added).

Once the Court has decided to order divestment it must turn to the question of how to insure that the affected party will not recreate directly or indirectly the illegal combination which the decree dissolved. After divestment, unless the affected party is forbidden to do so by specific injunctive language, it may renegotiate agreements, contracts, and even combinations dissolved by the courts.[3] Of course, this subsequent conduct would be subject to antitrust scrutiny, just as the earlier conduct had been.

One recent example of this occurred in *Ford Motor Co. v. U.S.*, 405 U.S. 562 (1972). There the Supreme Court affirmed a District Court decision which found that the Ford Motor Co. had violated the Celler-Kefauver Antimerger Act by acquiring certain assets from Electric Autolite Co.—in particular, Autolite's trade name and its facilities for manufacturing spark plugs. The District Court ordered Ford to divest these assets in order to reestablish competition in the spark plug market. It also prohibited Ford from using its trade name on spark plugs for five years, and enjoined it from manufacturing spark plugs for 10 years. After expiration of these time limitations Ford will be able lawfully to reestablish itself in the spark plug market. *Id.*, at 557. Indeed, without these terms, referred to by Chief Justice Burger as "ancillary injunctive provisions," Ford would have been able to

[3] *Standard Oil, supra* at 80-81. See also the cases cited by Judge Mansfield, Slip Op. at 176 regarding the ability of a divested company to grow back into a market.

grow back into the market immediately. *Id.*, at 582, 592 (concurring opinion).

Similarly, in this case, Congress ordered a divestment of international telegraph operations "theretofore carried on." The ancillary injunctive provisions of Section 222 are contained in Section 222(b)(1):

> *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

As can be seen, that section contains nothing to suggest that WU cannot, upon grant of FCC authority, grow back into the international telegraph market through development of new services, just as Ford may grow back into the spark plug market. As Judge Mansfield pointed out in his dissenting opinion, if Congress had wished to erect a continuing bar it could easily have done so. "All it had to do was to provide that following divestiture the merged enterprise should not engage in international operations or that it should be restricted to domestic service." Slip Op. at 172. Its silence on this point can not contort a plain order to divest into what amounts to a permanent injunction against growing back into the market.

Generally, Courts delve into the legislative history of a statute only when the intent of the statute is unclear or ambiguous on its face. *AT&T v. FCC,* 503 F.2d 612, 616 (2d Cir. 1973). This is because, as Judge Mansfield noted, "[n]ormally where the plain meaning of a statute is clear legislative history, even if indicating a different intent, will not justify a departure from that meaning. See *Caminetti v. United States,* 242 U.S. 470, 485 (1917)." Slip Op. at p. 174 (dissenting opinion).

Here, however, the majority ignored the clear, unambiguous meaning of the statute itself, and turned directly to the legislative history. There it seized upon statements made to Congress by then Chairman Fly and FCC Commissioner Durr, and an unenacted proposal considered by a Senate committee, to conclude that Congress intended more than is apparent on the face of the statute: "more than simply barring domestic carriers from engaging in the particular international operations and services that were being provided in 1943." Slip Op. at p. 170.

Even taken in combination, these aspects of the legislative history are insufficient to support the conclusion reached by the majority. The legislative history of §222, as Judge Mansfield noted, "far from lending support to the majority's position, tends to point in the opposite direction." Slip Op. at pp. 174-175. The statements by the two FCC Commissioners are not statements of Congressional committees or members—"They hardly reflect the views of the Senate and House Committees reporting on the proposed legislation, much less those of Congress." Slip Op. at p. 175 (dissenting opinion). Nowhere in the Committee reports is there any recommendation that the merged enterprise be *thereafter* forever barred from international telegraph message operations.

Even the preliminary Committee proposal relied upon by the majority[4] would only have "empower[ed] the

[4] See Slip Op. at 165:

> "(d) The legislation should define 'domestic' and 'international' carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest."
> S. Rep. No. 769 (*Study of the Telegraph Industry*), 77 Cong. Rec. 25,1st Sess. (1941).

Commission to restrict the merged company to domestic operations "if found to be in the public interest."[5] A suggestion that an agency be given *power to restrict* a company's area of operations is a far cry from a proposal that the agency be *prohibited from authorizing* operations in that area. Nor can it be construed as an indication that the order to divest subsequently adopted was actually intended to include a permanent injunction.

Every successive draft of §222 as it progressed in Congress contained the language "theretofore carried on." This, coupled with the undisputed fact that the dominant purpose underlying enactment of the divestment clause was the fear that WU would be able to use its monopoly position unfairly to favor its own established international message operations, points to the conclusion that Congress had no intention to go beyond the clear meaning of the statutory language.

The majority, erroneously we believe, refused to accord the usual weight to the agency's interpretation of its own statute, see *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969), because it construed two previous orders of the Commission to be inconsistent, and decided that this detracted from the validity of the decision under review. Both of those orders, *Telegraph Service with Hawaii,* 28 FCC 599, *aff'd on reconsideration,* 29 FCC 714 (1960), and *Western Union Divestment,* 30 FCC 323 (1961), came at a time when the Commission was working to achieve the divestiture ordered by Congress (the actual divestiture did not take place until 1963). The Commission was not there directly confronted with the necessity of determining whether the merged company could extend new services to international points after divestiture. Neither of these decisions should detract from the validity of the Commission's interpretation in the order under review.

[5] *Ibid.*

The majority's holding could stand only if §222 is read as an attempt by Congress to divide the international message telegraph industry permanently into separate domestic and international spheres. However, as the Commission noted in the order under review (A. 57-8),

> [h]ad Congress intended to divide the telegraph industry into domestic and international spheres, it would have done so by a provision more tailored to achieve that goal than the divestment clause.

The provision simply does not state such an intention; Section 222(c)(2) merely provides that WU must divest the international operations it had previously carried on.

While the legislative history indicates that Congress originally did intend to make such a division, *see, e.g.,* S. Rep. No. 769, *supra,* at 3-9, it is clear that Congress never enacted the legislation necessary to accomplish that goal. The text of the present Section 222 evolved over the course of several years, and in differing forms, in a number of House and Senate bills. As originally proposed, the legislation would have permitted both domestic and international mergers, authorized the domestic entity to acquire the domestic operations of international carriers,[6] and the international entity to acquire the international operations of the domestic carriers, and authorized WU to acquire the domestic telegraph operations of AT&T. See

[6] In 1943, several IRC's were authorized domestic PMS operations which had been suspended for the duration of World War II by the War Communications Board for reasons of internal security and the need to use the radio frequencies used in those operations. *The Western Union Telegraph Co.* 55 FCC 2d 668, 679 (1975) (Appendix A41). The validity of the underlying authorizations, however, was not affected by that action and the fact that none of those IRC's chose to revive those operations after the war has no bearing on the situation facing Congress in enacting Section 222.

S. Rep. No. 749, *supra.* Subsequently, World War II intervened, and the provisions relating to merger of the IRC's and the divestment of their domestic operations were removed. All that remained was the divestment clause in Section 222(c)(2). This provision alone is not sufficient to accomplish the total separation of the domestic and international markets which is implicit in the majority holding.

Since the language of Section 222(c)(2) by its terms applies only to WU, even under the majority's interpretation it would not preclude creation of a new domestic telegraph carrier, or the authorization of such an entity to compete with the IRC's internationally. Further, Section 222 is silent with respect to authorizing one or more of the IRC's to operate in the domestic sphere in competition with WU.[7] The failure of Congress to provide for these obvious eventualities militates strongly against an interpretation of Section 222 as an attempt to divide the telegraph market. Each of these eventualities is within the Commission's power to authorize under 47 U.S.C. 214 if it is determined that it will benefit the public interest.

Section 222 did nothing to erode the Commission's authority under Section 214 to authorize services and structure the industry in the manner most beneficial to the public interest. There is simply nothing in the Act, or its legislative history which can reasonably be interpretated

[7] The Commission has recently opened to all IRC's the existing gateways out of which international carriers may pick up and receive messages, *International Record Carriers' Scope of Operations In The Continental United States,* 58 FCC 2d 250 (1976), and presently has under consideration proposals to further expand the number of gateway cities, *Further Notice of Inquiry and Proposed Rule Making, Docket 19660,* 54 FCC 2d 532 (1975).

as an intention by Congress to strip the Commission of this authority. Without an explicit statement of intent so to limit the Commission's statutory authority, the Court must affirm the order under review. Any other conclusion conflicts with the pattern and scheme of the Communications Act, which as noted by Judge Mansfield—

> is to set forth legislative objectives and give broad authority to the FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in light of changing technology and market developments. See *United States v. Southwestern Cable,* 392 U.S. 157, 172-73 (1968).[8]

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[8] Slip Op. at p. 177-78 (dissenting opinion). The majority holding cannot be confined merely to Mailgram service, but will apply to any new technological developments which WU might be able to offer in international record services. As such it may impact adversely upon the Commission's duty "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and World-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151.

For the reasons stated above, the Federal Communications Commission respectfully requests that the case be reheard en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Faye R. Lee, hereby certify that the foregoing "Petition of the Federal Communications Commission for Rehearing and Suggestion for Rehearing En Banc" was served this 3rd day of November, 1976, by mailing true copies to the persons at the addresses listed below:

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